Nos. 72-777, 72-1129

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

CLEVELAND BOARD OF EDUCATION, et al., *Petitioners,*

v.

JO CAROL LA FLEUR, et al., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

SUSAN COHEN, *Petitioner,*

v.

CHESTERFIELD COUNTY SCHOOL BOARD, et al., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION OF INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS AFL-CIO-CLC, FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE
and
BRIEF OF INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, AS AMICUS CURIAE

WINN NEWMAN
RUTH WEYAND
1126 Sixteenth Street, N.W.
Washington, D. C. 20036
Phone: (202) 296-1200
Attorneys for International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, as Amicus Curiae

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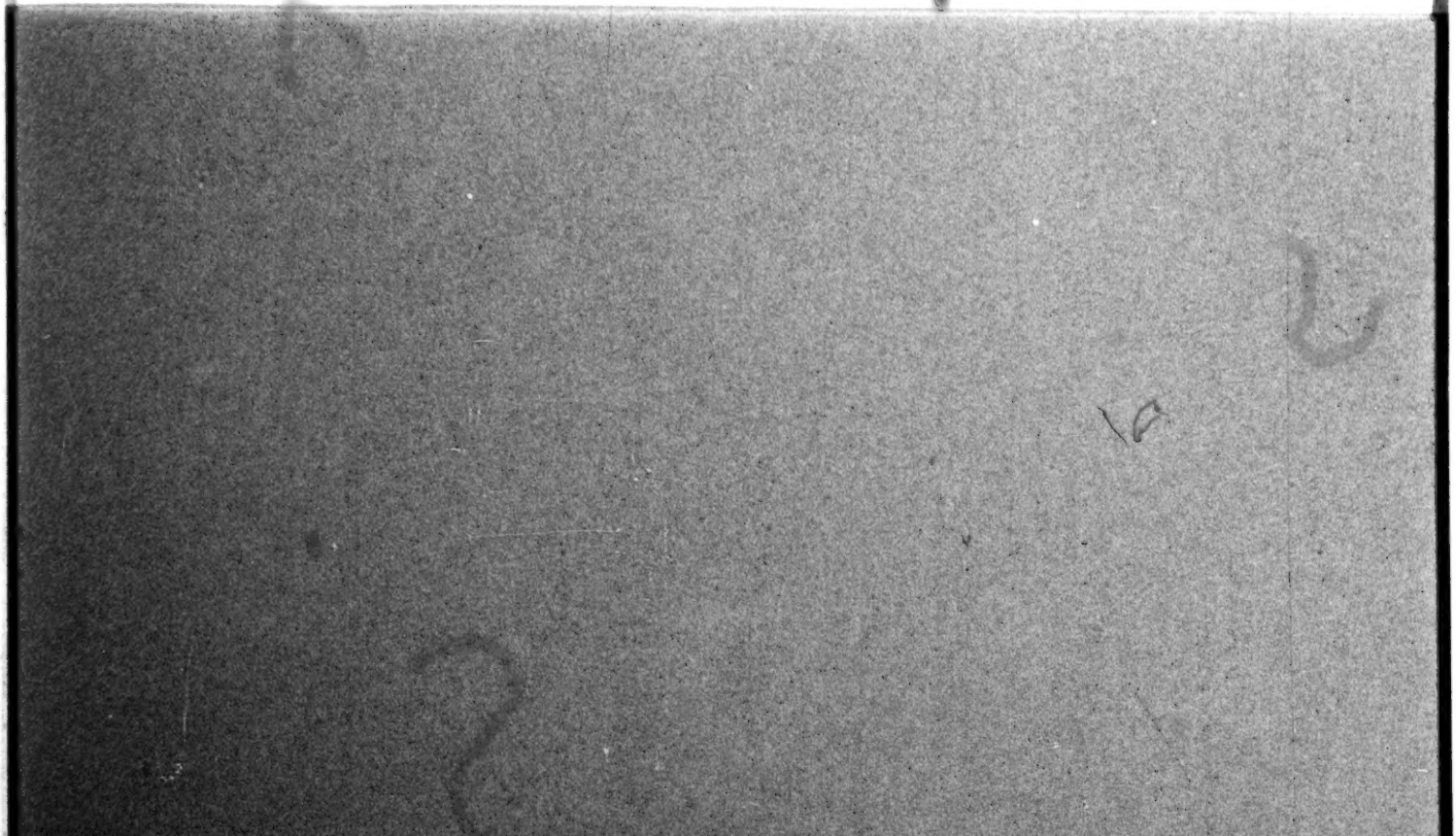

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MOTION OF INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Pursuant to Rule 42(3) of the Rules of this Court, the International Union of Electrical, Radio and

Machine Workers, AFL-CIO-CLC, hereinafter called IUE, respectfully moves this Court for leave to file a brief as amicus curiae in support of the respondents in Case No. 72-777 and in support of the petitioner in Case No. 72-1129. Written consent to the filing of such brief has been requested of all parties and granted by the respondents in Case No. 72-777 and the petitioner in Case No. 71-1129, but consent has been refused by the petitioners in Case No. 72-777 and by the respondents in Case No. 72-1129.

APPLICANT'S INTEREST

1. The applicant is an international labor organization which has as members, and represents, more than 100,000 women employed in the electrical equipment manufacturing industry.

2. During the past two years the IUE has been engaged in negotiations with approximately 400 employers in an effort to obtain collective bargaining provisions which would assure each female employee the right to continue to work at her usual job during pregnancy for as long as she is able to perform her job without injury to herself or her future offspring and the right to be accorded the same terms and conditions of employment as any other disabled employee during any period she is unable to work because of childbirth or other pregnancy-related disability.

3. The IUE is a party plaintiff in the following two cases pending in the federal district courts presenting issues which may be materially affected by the decision in this case: *Grogg* v. *General Motors Corp.*, U.S.D.C. S.D.N.Y. 73 Civ. 63, involving the issue of whether requiring all pregnant employees to go on unpaid ma-

ternity leave at the end of the seventh month of pregnancy, even though not then disabled, and failing to pay sickness and accident benefits for periods of absence for childbirth or other pregnancy-related disabilities on the same basis as are paid for absences due to other disabilities, constitute discrimination because of sex in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e; *Gilbert* v. *General Electric Co.,* 5 FEP Cases 989 (U.S.D.C.E.D. Va. 1973) involving a similar sick pay issue, with respect to which the EEOC found reasonable cause to believe that GE had engaged in discrimination because of sex. EEOC Decision No. YDC3-093 (May 18, 1973). 1973).

4. In addition to the above described cases, the IUE, its affiliated local or a member, with the assistance of the IUE, has filed, and there are presently pending, the following charges of discrimination because of sex with the Equal Employment Opportunity Commission or a state fair employment practice agency which raise one or more related issues respecting unpaid leave for periods of absence from work because of childbirth or other pregnancy-related disability; *Acme Electric Corp.,* Cuba, N.Y., N.Y. Division of Human Rights Complaint Case No. CS-26530-72; *Allis Chalmers,* Little Rock, Ark., EEOC Case Nos. TNO 2-0542, TNO 2-0547, TNO 2-0548; *American Safety Razor,* Staunton, Va., EEOC Case No. TDC-2-0877, TDC-2-0925; *American Technical, Inc.,* Lexington, Ky., EEOC Case No. TME 3-1282; *Avery* v. *General Railway Signal Co.,* N.Y. Division of Human Rights Complaint Cases No. CS-27503-72, etc.; *Chrysler, Inc.,* Dayton, Ohio, EEOC Case Nos. TCB 0073, TCB 0144; *Copeland Refrigerator Corp.,* Sidney, Ohio, EEOC Case No. TCL 2-0828; *Electronic Control,* Monogah, W.Va.,

West Virginia State Human Rights Division Case No. TP 13-0659; *Franklin* v. *Stromberg-Carlson Corp.*, N.Y. Division of Human Rights, Complaint Cases Nos. CS-27069-72, etc., *Magnavox*, Norristown, Tenn., EEOC Case No. B168-5-1083-E; *Wagner Electric Co.*, St. Louis, Mo., EEOC Case Nos. TSL 3-552, TSL 30-193; *Westinghouse Electric Corp.*, EEOC Case No. TPB 0190.

QUESTIONS OF FACT AND LAW WHICH HAVE NOT BEEN AND PROBABLY WILL NOT BE ADEQUATELY PRESENTED BY THE PARTIES

The IUE believes that the following questions of fact and law have not been, and there is reason to believe they will not be, adequately presented in the briefs of the parties.

1. Whether there is any medical basis for a rule which requires a female employee because she has reached a specified month of pregnancy and without regard to her actual physical condition, to cease work at any time before the onset of labor.

2. Whether state action which denies a female the right to work and continue to be paid her salary solely because she is pregnant, when she is as fully able to perform all the duties of her job as if she were not pregnant, violates the due process and equal protection clauses of the Fourteenth Amendment.

3. Whether the practice of an employer which requires a female employee to be absent from work without pay on account of pregnancy and childbirth for a longer period than is medically necessary constitutes an unreasonable impediment to the ability of the female to compete in employment with males.

The IUE has reason to doubt the adequacy of the presentation of the foregoing questions. We do

not underrate the excellent briefing ability of other counsel but merely suggest that the IUE, because of its extensive experience with these problems, may be able to assist this Court with a type of presentation not available to other counsel.

The questions of law and fact which the IUE desires to brief are relevant. The Brief for Petitioners in No. 72-777, pp. 5-10, 13, 23-24, 25-26, 36-39, 41-66 rests primarily on the contention that a pregnant woman is not as able bodied as a non-pregnant woman. The brief of IUE will show there is no medical basis for this position. The court of appeals in No. 72-1129 rested its decision primarily on the erroneous assumption that there is no effect in competition between males and females in employment, of refusing to permit females who are pregnant to be gainfully employed. The brief of amicus curiae will demonstrate that employer policies denying females continuity of employment and tenure affect all aspects of their competition with males as to wage rates, jobs, training, promotions and fringe benefits.

For the foregoing reasons it is respectfully urged that this Court grant the IUE leave to file a brief as amicus curiae.

WINN NEWMAN
RUTH WEYAND
1126 16th Street, N.W.
Washington, D. C. 20036
Phone: 202-296-1200
Attorneys for International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, as Amicus Curiae

July 31, 1973

IN THE

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BRIEF OF INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, AS AMICUS CURIAE

INTEREST OF AMICUS

The International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, hereinafter called IUE, is an international labor organization composed

of employees of manufacturers of electronic products and equipment, electrical machinery, appliances and products, machine tools and allied products. The IUE has more than 100,000 female members.

One of the primary objectives of IUE in its representation of its female members has been the elimination and correction of sex discrimination. In its efforts to secure equal pay and promotions for its female members, IUE has had to counter the employers' traditional attempts to justify paying females lower wages than males and denying females higher paying jobs on the ground that females were less valuable as employees than males because of the repeated and lengthy absences of females from the labor force in connection with child bearing and child rearing.[1] These same employers have been, to an undetermined extent, responsible for the transient qualities of the female labor force because they forced women out of jobs when they become pregnant,[2] terminated all their sen-

[1] In *General Electric Company*, 28 War Lab. Rep. 666, 676, 671, 680, 686 (1945) proceedings instituted by the United Electrical, Radio and Machine Workers, the predecessor to the IUE, the War Labor Board quoted manuals used by GE and Westinghouse in setting wage rates which expressly provided for lower rates for work when performed by females because females were allegedly "transient" employees. Similarly, see the reference to child bearing in the justification for sex discrimination in fixing of wage rates in *United Screen and Bolt Co.*, 17 War. Lab. Rep. 232, 235 (1944).

[2] See *Westinghouse Electric Corp.*, 45 LA 621 (P. Hebert, Arbitrator, 1965) in which the IUE made an unsuccessful attempt to get an arbitrator to sustain the grievance of a female with 19 years of seniority who tried to hide her pregnancy but was discharged on April 4, 1962 pursuant to the Company's policy to treat as a "voluntary quit" any employee who became pregnant. Westinghouse had refused even to submit the issue to arbitration and the IUE had obtained an order from the federal district court

iority rights[3] and often kept them out for a number

compelling arbitration. *IUE* v. *Westinghouse*, 55 LRRM 2952 (U.S.D.C.S.D.N.Y. 1964). For contra arbitration awards see *Gem Electric Co., Inc.*, 11 LA 684 (Sidney Wolff, Arbitrator, 1948, prosecuted by IUE's predecessor UE); *Alwin Mfg. Co.*, 38 LA 632 (John F. Sembower, Arbitrator, 1962); *National Lead Co.*, 18 LA 528, 530 (Arthur Lesser, Jr., Arbitrator, 1952); *Republic Steel Corp.*, 37 LA 367 (Joseph G. Stashower, Arbitrator 1961). In *Kupczyk* v. *Westinghouse Electric Corp.*, the New York State Division of Human Rights, Case No. CSF 15206-67 (March 3, 1969, EPG Par. 26,000B.37 held that the discharge of an employee for pregnancy and subsequent refusal to reemploy her constituted discrimination in employment because of sex in violation of the New York State Human Relations Act, Section 296, Art. 15, N.Y. Executive Law, Ch. 119. The IUE has filed charges against Westinghouse, EEOC Case No. TPB 0190, which are still pending, in support of which IUE has submitted evidence to EEOC of a continuing practice of discharging or coercing the resignation of pregnant employees, including recent instances of employees who unsuccessfully tried to hide their pregnancy in order not to lose their jobs and their seniority. See Prentice-Hall, Personnel Management Policies and Practices, Report Bulletin 25, Vol. XIX, June 6, 1972, p. 457 reporting on the changes that have taken place since Title VII became effective and noting that prior thereto 3/5 of the offices and non-union plants denied maternity leave, which meant employees were discharged when they became pregnant.

[3] See EEOC Decision No. 71-413, CCH-EEOC Dec. Par. 6204, November 5, 1970, holding that failure of an employer to recognize employee's date of original hire as her seniority date, and the employer's insistence that her seniority date was her date of reemployment following an absence for childbirth, constituted unlawful discrimination because of sex in violation of Title VII. The EEOC required restoration of her original date of hire as her seniority date. The Prentice Hall Survey of Maternity Leave Practices of over 1,000 employers conducted in 1965 shortly after Title VII took effect, showed that in many companies if a woman wanted to return to work after the birth of her baby, she was considered a "new hire" with no seniority rights. Prentice-Hall, Personnel Management-Policies and Practices, Report Bulletin 25, Vol. XIX, June 6, 1972, p. 457.

of years thereafter by refusing to hire women with young children.[4]

Prior to the enactment of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, and the parallel state fair employment practice statutes,[5] the IUE had attempted through collective bargaining and submission of grievances to arbitration to protect women against loss of jobs because of pregnancy.[6] With the enactment of this legislation, IUE has through charges filed by the international union, affiliated locals or

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[4] See *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542, 91 S.Ct. 496 (1971) where this Court held that refusal to hire women with pre-school age children constituted sex discrimination within the meaning of Title VII.

[5] Thirty three states and the District of Columbia bar discrimination in employment because of sex. Alaska, F.E.P. 451:54; Arizona, F.E.P. 451:101, 103; California, F.E.P. 451:127; Colorado, F.E.P. 451:178; Connecticut, F.E.P. 451: 203; Delaware, F.E.P. 451:226; District of Columbia, F.E.P. 451:261; Hawaii, F.E.P. 451:285; Idaho, F.E.P. 451:302; Illinois, F.E.P. 451:325; Indiana, F.E.P. 451:375; Iowa, F.E.P. 451:403; Kansas, F.E.P. 451:432b; Maryland, F.E.P. 451:530; Massachusetts, F.E.P. 451:553; Michigan, F.E.P. 451:578; Minnesota, F.E.P. 451:626; Missouri, F.E.P. 451:675; Montana, F.E.P. 451:701; Nebraska, F.E.P. 451:726; Nevada, F.E.P. 451:752; New Hampshire, F.E.P. 451:775; New Jersey, F.E.P. 451:805; New Mexico, F.E.P. 451:853; New York, F.E.P. 451:876b; Oklahoma, F.E.P. 451:965; Oregon, F.E.P. 451:978; Pennsylvania, F.E.P. 451:102; Utah, F.E.P. 451:1153; Vermont, F.E.P. 451:1175; Washington, F.E.P. 451:1229; West Virginia, F.E.P. 451:1255; Wisconsin, F.E.P. 451:1275; and Wyoming, F.E.P. 451:1302. Three states, Illinois, Pennsylvania, have ratified equal rights provisions which are included in their state constitutions.

[6] See references to collective bargaining agreements negotiated by IUE to entitle employees disabled by pregnancy or childbirth to the same leave rights as are enjoyed by other disabled employees, in the opinion of the arbitrator in *Westinghouse Electric Corp.*, 45 LA 621, 624, 626, 629-630 (P. Hebert, Arbitrator, 1965), which as noted in fn. 2, p. 8, *supra*, was a case in which the IUE submitted this issue to arbitration.

members, and by the filing of, or intervention in, law suits, made an effort to obtain rulings that all singling out of pregnancy for special treatment constitutes unlawful discrimination because of sex.[7]

Following the issuance of Judge Merhige of his decision in the *Cohen* case (No. 72-1129) on May 17, 1971, that mandatory maternity leave constituted discrimination because of sex and EEOC Decision No. 71-1474, CCH-EPG Par. 6221, on March 19, 1971 that the refusal of an employer to give sick pay to employees disabled by childbirth and complications of pregnancy on the same basis as it is paid to employees otherwise disabled similarly constituted unlawful sex discrimination, the IUE undertook a program aimed at securing the benefits of these decisions for the females it represented. As collective bargaining agent the IUE has during the past two years been engaged in negotiations with approximately 400 employers for the purpose of abolishing all mandatory maternity leave rules and securing to female employees the right to continue to work at their usual job until the onset of labor unless they were unable to perform effectively or it was medically determined that continued employment would be harmful to the employee, with an

[7] E.g., *Mann* v. *Allis Chalmers Mfg. Co.*, Norwood, Ohio, EEOC Case No. TCLO 1015, EEOC Decision No. YCL 1246, February 24, 1971 holding that failure to grant a personal leave of absence for two weeks following the date of childbirth which was requested by her personal physician on her behalf as necessary for recuperation from childbirth constituted unlawful sex discrimination where a male employee had been granted approximately 13 months of leave of absence in order to undergo a series of back operations. IUE supported Mann's position in her court suit, *Mann* v. *Allis Chalmers Mfg. Co.*, U.S.D.C.S.D. Ohio W.D. Civil Action No. 8115, which was settled by stipulation of all the parties, after she was reinstated, her original seniority date restored and a sum of money paid in settlement of the back pay claim.

accompanying right to all the same benefits as other disabled employees for periods of disability due to childbirth or the complications of pregnancy.

With some employers, the IUE has been completely successful.[8] Most employers have agreed with IUE to permit pregnant employees to continue working until such time as it is medically determined by either their own doctor or the employer doctor that for medical reasons they shall cease working, but have refused to accord them during the period of their absence from work on account of childbirth or other pregnancy-related disability, the same benefits as other disabled employees receive during their absence on account of disability. Still other employers have entered into standby agreements with the IUE making retroactive to the date of the signing of the agreements of rights of employees with respect to sick pay for periods of absence due to childbirth or other pregnancy-related disability should the courts in cases involving other employers make a final resolution of the issue in favor of pregnant employees.

IUE's lack of success as to other employers has resulted in the filing by IUE, its affiliated locals or members of charges with the Equal Employment Op-

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[8] E.g., Memorandum of Agreement, June 14, 1973, between IUE and ITT Electric Optical Products Division, Roanoke, Virginia plant, abolishing all mandatory maternity leave and entitling employees disabled by childbirth or pregnancy to the same weekly indemnity of $50 up to 13 weeks maximum as available to any employee disabled by any other illness or accident; agreement of July 1, 1972 between IUE Local 502 and Airco Speer Carbon Graphite, St. Marys, Pa., same, except weekly benefits are $55 but not in excess of 70% of basic weekly earnings; supplemental agreement between Local 932, IUE and Cooperative Services, Inc., Detroit, Mich., June 22, 1973, same except such benefits range from $70 to $130 per week up to a 26 week maximum; agreement between IUE Local 934 and Elcon Systems, Inc., Detroit, Mich., May 31, 1973, same as Cooperative Services.

portunity Commission, hereinafter called EEOC,[9] and state fair employment practice agencies [10] and the filing of suits in the federal district courts,[11] alleging that various policies and practices of employers in singling out pregnancy for special treatment constitutes unlawful sex discrimination in violation of Title VII or similar state law.

The IUE's interest is primarily in the private sector rather than the public sector. All of the cases in which IUE is involved arise under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e or similar state legislation, rather than under the Fourteenth Amendment. It is therefore possible that the instant cases could be decided by this Court on grounds which would not affect the interpretation and application of Title VII to the cases in which IUE is interested. However, all of the judges below framed the issue in the case in terms of a sex discrimination standard which might be equally applicable under both

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[9] *Allis Chalmers,* Little Rock, Ark., EEOC Case Nos. TNO 2-0543, TNO 2-0547, TNO 2-0548; *American Safety Razor,* Staunton, Va., EEOC Case No. TDC-2-0877, TDC-2-0925; *American Technical, Inc.,* Lexington, Ky., EEOC Case No. TME-3-1282; *Chrysler, Inc.,* Dayton, Ohio, EEOC Case Nos. TCB 0144; *Copeland Refrigerator Corp.,* Sidney, Ohio, EEOC Case No. TCL 2-0828; *Magnavox,* Norristown, Tenn., EEOC Case No. B168-5-1083E; *Wagner Electric Co.,* St. Louis, Mo., EEOC Case Nos. TSL 3-552, TSL 30-193; *Westinghouse Electric Corp.,* EEOC Case No. TPB 0190.

[10] *Acme Electric Corp.,* Cuba, N.Y., N.Y.S.H.R. Case No. CS-26530-72; *Avery* v. *General Railway Signal Corp.,* N.Y. Division of Human Rights Case, Nos. CS-27503-72, etc.; *Electronic Control, Monogah,* W.Va., W.Va. State Human Rights Division Case No. TP 13-0659; *Franklin* v. *Stromberg-Carlson Corp.,* N.Y. Division of Human Rights Case Nos. CS-27069-72, etc.

[11] *Grogg* v. *General Motors Corp.,* U.S.D.C.S.D.N.Y. 73 Civ. 63; *Gilbert* v. *General Electric Co.,* 5 FEP Cases 989 (U.S.D.C.E.D. Va. 1973).

Title VII and the Fourteenth Amendment. The reasoning of the Fourth Circuit in the *Cohen* case although accompanied by a disclaimer of any intention to rule on the validity of the EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. 1604.10(a), insofar as it treated pregnancy as unique and not affecting competition between males and females, should it be affirmed by this Court, might well be deemed controlling with respect to the interpretation of Title VII. Similarly, the position briefed by the Cleveland School Board, if adopted by this Court, might be prejudicial to the pending cases involving pregnancy in which IUE is now involved as set forth above.

The IUE believes that sex equally with race constitutes a "suspect" or "invidious" classification for purposes of the Fourteenth Amendment. The IUE will not here brief this issue because it is convinced that the mandatory maternity leave policies here involved must be held unconstitutional under the Court's approved standards of testing the validity of sex discrimination for purposes of the Fourteenth Amendment.

OPINION BELOW

In the *La Fleur* case (72-777), the opinion of the United States Court of Appeals for the Sixth Circuit is reported in 465 F.2d 1184. The opinion of Judge James C. Connell in the District Court for the Northern District of Ohio, Eastern Division is reported in 326 F.Supp. 1208 (N.D. Ohio, 1971).

In the *Cohen* case (No. 72-1129), the opinion of the United States Court of Appeals for the Fourth Circuit is reported in 474 F.2d 395. The opinion of Judge Robert H. Merhige, Jr., in the United States District Court for the Eastern District of Virginia, Richmond Division, is reported at 326 F.Supp. 1159.

QUESTIONS PRESENTED

1. Whether there is any medical basis for a rule which requires a female employee, because she has reached a specified month of pregnancy and without regard to her actual physical condition, to cease work at any time before the onset of labor.

2. Whether state action which denies the right to work and continue to be paid her salary solely because she is pregnant, when she is as fully able to perform all the duties of her job as if she were not pregnant, violates the due process and equal protection clauses of the Fourteenth Amendment.

3. Whether the practice of an employer which requires a female employee to be absent from work without pay on account of pregnancy and childbirth for a longer period than is medically necessary constitutes an unreasonable impediment to the ability of the female to compete in employment with males.

STATEMENT

Three pregnant school teachers, Jo Carol La Fleur, a seventh grade teacher, (*La Fleur* pp. 4a, 37a-38a), Ann Nelson, a junior high school French teacher, (*La Fleur* pp. 28a, 38a, 45a) and Susan Cohen, a Senior High School Government teacher (*Cohen* A 13), were required to go on unpaid leave pursuant to rules adopted by their respective school boards several months prior to their expected delivery date, over their protests, supported by their personal physicians, that they were fully capable of performing their jobs for a longer period of time. The rules of the Cleveland Board of Education which were applied to plaintiffs La Fleur and Nelson, imposed a mandatory unpaid maternity leave of absence to be effective not less than

five months before the expected date of delivery and to continue until the beginning of the next regular semester following the three months age of the child (*La Fleur* p. 39a). The rules of the Chesterfield County School Board, which were applied to plaintiff Cohen, imposed a mandatory unpaid maternity leave of absence to be effective at least four months prior to the expected birth of the child with reemployment guaranteed no later than the first day of the school year following the date that the teacher is declared eligible for reemployment by a written notice from the physician that she is physically fit for full-time employment (see rules quoted 474 F. 2d at 396, fn. 2).

Each of the three pregnant school teachers instituted a suit under the Civil Rights Act of 1871, 42 USC 1983, alleging that the school authorities violated the equal protection clause of the Fourteenth Amendment by refusing became of her pregnancy to permit her to continue to teach when she was fully capable of performing her job and her personal physician had advised that she could continue to work.

Susan Cohen was successful in the district court. Judge Merhige, after a full trial on the merits, held that the defendant school board had violated the Fourteenth Amendment. He stated (326 F. Supp. at 1161):

> "The maternity policy of the School Board denies pregnant women such as Mrs. Cohen equal protection of the laws because it treats pregnancy differently than other medical disabilities. Because pregnancy, though unique to women, is like other medical conditions, the failure to treat it as such amounts to discrimination which is without rational basis, and therefore is violative of the equal protection clause of the Fourteenth Amendment."

On appeal by the school board, the Fourth Circuit at first affirmed by a divided court and then on a rehearing en banc, again by a divided court, reversed. 474 F.2d 395.

The plaintiffs La Fleur and Nelson lost before the district court but were successful on their appeal to the Sixth Circuit, which by a divided court reversed the judgment of the district court. 465 F.2d 1184.

SUMMARY OF ARGUMENT

I. Today it is accepted medical practice that women may continue to work at their accustomed jobs throughout pregnancy and up to delivery. Recent studies have shown that women during their 24th to 35th week of pregnancy have a higher exercise efficiency that either non-pregnant women or women in earlier stages of pregnancy. Such a small percentage of women, probably as small as 10 or 15 percent, suffer any complications during pregnancy as to afford no reasonable basis for a mandatory leave policy applicable to all pregnant women without regard to their actual medical condition.

II. A mandatory leave policy which cannot be supported by any rational grounds violates the equal protection and due process clauses of the Fourteenth Amendment. The right to earn a living at one's accustomed calling is a fundamental right which can be infringed only to serve a compelling state need. No state need is shown here. The holdings of EEOC, state fair employment practice agencies and numerous federal courts that mandatory leave constitutes unlawful sex discrimination should be followed.

III. The school board rule, by compelling a female employee to be absent from work without pay for a

longer period than is medically necessary constitutes an unreasonable impediment to the ability of the female to compete in employment with the male. She loses continuity of tenure while the male retains it. She loses actual experience on the job which the male is getting while she is on leave. She has fewer funds to use for acquiring further education while the male has the opportunity to have his earnings and use them to advance his education, with resulting enhanced teaching status.

ARGUMENT

Introduction

Most, if not all, distinctions in treatment, for purposes of employment, between men and women are based upon either actual or supposed differences arising from women's child-bearing capacity. After all, it is the fact that women bear children and men do not, which creates the classification of the human species into male and female. The whole range of employer practices[12] differentiating between male and female and all the so-called female state "protective" [13] legislation have historically been justified on grounds leading directly or indirectly to either the potential or actual child-bearing function of women.

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[12] E.g., *United Screen and Bolt Co.*, 17 War Lab. Rep. 232, 235 (1944) where an employer after determining by established job evaluation methods the point value of jobs without regard to the sex of the employee had placed a lower wage rate on the job when performed by a female because her potential for absences for childbirth allegedly made her services of less value to the employer.

[13] *Muller* v. *Oregon*, 208 U.S. 412, 421 (1908) sustaining the constitutionality of an Oregon statute forbidding employment of females for more than ten hours per day, in which one of the reasons for limiting her to ten hours was described by this Court as "her maternal functions." See *Cheatwood* v. *South Central Bell Tel. & Tel. Co.*, 303 F. Supp. 754, 759-760, 2 FEP Cases 33.36 (M.D. Ala. 1969) arising under Title VII holding possible pregnancy of some women no basis for denying job to all women.

More specifically, practices based on singling out pregnancy for special treatment have deprived female of their seniority rights and left them with a junior status when applying for a job or promotion. Even the one-tenth of all females who remain single and have a longer work life on the average than male employees, 45 years for females as against 43 for males,[14] have been denied training for, and promotions to, higher paying jobs on the employer assumption that they would not remain in the labor market as permanent employees.

The discrimination against women as workers which followed the combined concern for her as a future mother, with the accompanying employer ability to discount the value of her services because of her alleged transiency in the labor force, brought such a host of ills as to generate the federal and state equal pay and equal protection laws and occasion a new judicial approach.

Without attempting to catalogue the ills flowing from sex discrimination, we call attention to the resulting poverty. The 1970 Report of the President's Task Force on Women's Rights and Responsibilities entitled, "A Matter of Simple Justice," U.S. Government Printing Office 1970, p. 18, stated:

> "Sex bias takes a greater economic toll than racial bias. The median earnings of white men employed year-round fulltime is $7,396, of Negro men $4,777, of white women $4,279, of Negro women $3,194. Women with some college education both white and Negro, earn less than Negro men with 8 years of education.
>
> "Women head 1,723,000 impoverished families, Negro males head 820,000. One-quarter of all

[14] U.S. Department of Labor, Women's Bureau Bulletin No. 294, 1969 Handbook on Women Workers, Government Printing Office 1969, p. 7.

families headed by white women are in poverty. More than half of all headed by Negro women are in poverty. Less than a quarter of those headed by Negro males are in poverty. Seven percent of those headed by white males are in poverty." (footnotes omitted)

In 1972 the median income for white men working year round full time was $10,918, of Negro men $7,373, of white women $6,172, of Negro women $5,280. U.S. Department of Commerce, Current Population Reports, Consumer Income, Series P-60, No. 87, June 1973. Women headed 2,100,000 unpoverished families. U.S. Department of Labor, Employment Standards, Women's Bureau, Facts About Women Heads of Households and Heads of Families, April 1973 p. 8.

The key role of employer practices with respect to employment of pregnant women has been the subject of a study and report by the Presidentially appointed Citizen's Advisory Council on the Status of Women, Women in 1970, Appendix D, page 20, which stated:

> "Childbirth and complications of pregnancy are, for all *job-related purposes,* temporary disabilities and should be treated as such under any health insurance, temporary disability insurance, or sick leave plan of an employer, union or fraternal society. Any policies or practices of an employer or union, written or unwritten, applied to instances of temporary disability other than pregnancy should be applied to incapacity due to pregnancy or childbirth, including policies or practices relating to leave of absence, restoration or recall to duty and seniority.
>
> "No additional or different benefits or restrictions should be applied to disability because of pregnancy or childbirth, and no pregnant woman employee should be in a better position in relation to job-related practices or benefits than an em-

ployee similarly situated suffering from other disability." (Emphasis in original)

Thereafter the EEOC and various state fair employment practice commissions issued guidelines in conformity with the recommendation of the Citizen's Advisory Council above quoted. All those guidelines stated that an employer is guilty of invidious discrimination because of sex if he denies full employment opportunities to a pregnant woman who is medically determined to be able to work. The pertinent provisions of the EEOC's Guidelines on Discrimination Because of Sex, 29 U.S.C. 1604.10, issued March 31, 1972, reads:

"1604.10 *Employment policies relating to pregnancy and Childbirth.*

"(a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is in prima facie violation of Title VII.

"(b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, and accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

"(c) Where the termination of an employee who is temporarily disabled is caused by an em-

> ployment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity."

The following states have adopted guidelines which similarly bar mandatory unpaid maternity leave: Illinois Sex Discrimination Guidelines, Section X, effective November 3, 1971, CCH-EPG Par. 23,820.08; Maryland Sex Discrimination Guidelines, Section 8, F.E.P. 451:541; Minnesota Sex Discrimination Guidelines, Section 51e, CCH-EPG Par. 21,490.05; Pennsylvania Sex Discrimination Guidelines, as amended December 20, 1971, CCPH-EPG Par. 27,296.02; Washington Sex Discrimination Guidelines, WAC 162-30-020 (5), CCH-EPG 28,574(4); Wisconsin Sex Discrimination Guidelines, adopted July 10, 1972, CCH EPG Par. 29,100(B).

The Office of Federal Contract Compliance acting pursuant to Executive Order No. 11,246, 3 C.F.R. 339, on November 12, 1970, issued the following question and answer to its agency compliance officers:[15]

> "Q. May a contractor specify the time when maternity leave shall begin?
>
> "A. Not normally. This is primarily a medical decision which is not reasonable for a contractor to make in terms of a blanket policy. The time when a woman leaves before childbearing is normally between the pregnant employee and her doctor."

Prior to adopting its Guidelines the EEOC had consulted Dr. Andre E. Hellegers and utilized his services as an expert witness in proceedings instituted

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[15] Memorandum to heads of Agencies from John L. Wilkes, Director, Office of Contract Compliance, Dep't of Labor, Questions and Answers Concerning Sex Discrimination Guidelines, Nov. 12, 1970.

by EEOC before the Federal Communications Commission. A copy of the testimony of Dr. Hellegers before the Federal Communications Commission is attached hereto as Appendix A, pp. 1a-10a, *infra*. Dr. Hellegers testified that there is "no physiological data which would warrant a rule that women in pregnancies should cease working." (p. 1a, *infra*) Before so testifying, Dr. Hellegers had cooperated with EEOC in preparing key words to be placed in the Medlars Computer retrieval system at the National Institute of Health for the purpose of locating and studying all the medical literature relevant to the issue.[16]

As we shall show hereinafter, the principle adopted by the Guidelines, with respect to the right of a pregnant employee to continue to work up until delivery unless she is medically determined to have complications which disable her from work, is based on accepted medical practice.

I.

There is no medical basis for a rule which requires a female employee because she has reached a specified month of pregnancy and without regard to her actual physical condition, to cease work at any time prior to the onset of labor.

In neither *La Fleur* (No. 72-777) nor *Cohen* (No. 72-1129) has the school board ever contended that the school teacher plaintiffs, La Fleur, Nelson and Cohen, were in any way physically disabled. Each was admittedly an excellent teacher, and there is not a scintilla of evidence that any of their pregnancies had impaired their performance of their duties or that

[16] Information furnished to counsel for the IUE by David Copus, attorney, EEOC, who worked with Dr. Hellegers in arranging for the Medlars retrieval project at the National Institute of Health.

continued employment would in any way harm any of them or their offspring. Rather the respective school boards rest on their position that the school board's rules are valid. We believe that La Fleur, Nelson and Cohen, having been healthy and able bodied, should have been judged as individuals rather than by general rules which operated discriminatorily as applied to them. However, there is not even a medical basis in the record in either the *La Fleur* or the *Cohen* case for a mandatory leave policy. To the contrary, all of the doctors who testified in the *La Fleur* case and the only doctor to testify in the *Cohen* case, the Chesterfield school board not having called any medical witness, testified that they regularly advised patients who had no complications, to work throughout their pregnancies (*Cohen,* pp. 25-28, 71, 75-77; *La Fleur,* pp. 92a, 93c, 128a, 148a-150a, 151a, 156c-157a).

The medical literature fully supports the view that pregnancy per se without complications does not disable an employee from continuing to perform the same job as she was accustomed to performing when she became pregnant. Not only is it medically established that there is no deterioration in a pregnant woman's mental and physical capacity by reason of pregnancy, but several recent studies indicate it is in fact enhanced. Studies of comparative exercise efficiency of pregnant and non-pregnant women showed that pregnant women between the 24th and 35th weeks of pregnancy have a greater exercise efficiency than non-pregnant women or women during the earlier months of pregnancy.

Joseph Seitchik, Body Composition and Energy Expenditure During Rest and Work in Pregnancy,

American Journal of Obstetrics and Gynecology, Vol. 57, page 701, March 1, 1967, describes an exercise study of 195 women, divided between 133 pregnant women, 34 non-pregnant women and 28 postpartum women. He used a stationary bicycle ergometer. His conclusions were stated as follows (at p. 709):

> "Our pregnant women did not pay a greater price for the performance of this specific quantity of work. They appear to be at least as efficient as nonpregnant women, and are most efficient between 24 and 35 weeks. In retrospect, this result is not surprising. The period of maximum exercise efficiency occurs during that time when the cardiac output and blood volume are reaching their maxima. Pregnancy produces no alterations in the ability to ventilate. Therefore, the cardiovascular and respiratory set of the pregnant woman should not produce anv limitation of exercise tolerance."

In a comment accompanying the publication of the article, Dr. Edward C. Hughes of Syracuse states (at p. 710):

> "The interesting finding that pregnant women are more efficient in carrying work loads during the twenty-fourth to thirty-fifth weeks of pregnancy brings up several possible explanations. It is possible that between the twenty-fourth and thirty-fifth weeks of pregnancy the body activity is at its maximum efficiency. Certain physiological events seem to point in this direction.
>
> "1. Cardiac output begins to rise at about the tenth week, reaches a peak action between the twenty-fifth and thirtieth weeks, and gradually declining to near normal at term. The maximum reported values average between 30 and 40 percent above the nonpregnant level, the increased

continued employment would in any way harm any of them or their offspring. Rather the respective school boards rest on their position that the school board's rules are valid. We believe that La Fleur, Nelson and Cohen, having been healthy and able bodied, should have been judged as individuals rather than by general rules which operated discriminatorily as applied to them. However, there is not even a medical basis in the record in either the *La Fleur* or the *Cohen* case for a mandatory leave policy. To the contrary, all of the doctors who testified in the *La Fleur* case and the only doctor to testify in the *Cohen* case, the Chesterfield school board not having called any medical witness, testified that they regularly advised patients who had no complications, to work throughout their pregnancies (*Cohen,* pp. 25-28, 71, 75-77; *La Fleur,* pp. 92a, 93c, 128a, 148a-150a, 151a, 156c-157a).

The medical literature fully supports the view that pregnancy per se without complications does not disable an employee from continuing to perform the same job as she was accustomed to performing when she became pregnant. Not only is it medically established that there is no deterioration in a pregnant woman's mental and physical capacity by reason of pregnancy, but several recent studies indicate it is in fact enhanced. Studies of comparative exercise efficiency of pregnant and non-pregnant women showed that pregnant women between the 24th and 35th weeks of pregnancy have a greater exercise efficiency than non-pregnant women or women during the earlier months of pregnancy.

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output probably being due to increased cardiac volume.

"2. The blood volume reaches 20 to 30 percent above the normal from the twenty-fifth to thirty-fourth week of pregnancy with increments in both the plasma volume and red cell mass. This is followed by a decline during the last 4 to 6 weeks of pregnancy, although term values still are definitely higher than the normal. The hypothesis that placental function with increased hormone-steroid production may have an effect upon these activities, affecting cardiac output and the general metabolic activity, has been proposed by others."

Michael Bruser, Sporting Activities During Pregnancy, Journal of Obstetrics and Gynecology, Vol. 32, p. 72 (November, 1968), summarizes his conclusions respecting this study as follows:

"A recent report of certain exercise tests done in 34 nonpregnant, 133 pregnant, and 28 recently-pregnant women offered the following conclusions:

"1. Pregnancy produces no alteration in the ability to ventilate.

"2. The period of maximum exercise efficiency occurs during the time when cardiac output and blood volume reach their maximums.

"3. Measurements of exercise efficiency show that pregnant women are as efficient as nonpregnant women (except that women who were 24-35 weeks pregnant were even more efficient).

"4. There should be no limitation of exercise on any presently identifiable physiologic grounds until very late in pregnancy, when many of the physiologic alterations of pregnancy, such as cardiac output, revert to nonpregnant levels."

The above cited article on sporting activities contains numerous interesting facts respecting the placement of pregnant women in Olympic sporting events, including the fact that of 26 female Soviet Olympic champions of the XVI Olympiad in Melbourne, ten were pregnant (at p. 723). Bruser also states that (at p. 722):

> "In 1961, a report from a German sports school stated that the physicians there had learned to allow all sports during pregnancy except those accompanied by 'bumping and compression.' They also stated that the athlete has a better labor—i.e., easier and with fewer complications."

The illogical character of employer insistence on mandatory leave applicable to the last half rather than the first half of pregnancy is commented upon in William J. Dignam, Work Limitations of the Pregnant Employee, Journal of Occupational Medicine, Vol. IV., 1962, p. 423 at p. 424:

> "Many institutions have an arbitrary policy with respect to how long pregnant women may work, but I doubt that these policies are logical from a medical point of view. In general a woman is no less efficient, and perhaps more so, in late pregnancy than in early pregnancy."

In appendices to this brief we have reprinted excerpts from the testimony of four outstanding obstetricians given in cases in which the issue for decision was whether it was a violation of fair employment practices legislation barring sex discrimination for employers to apply different leave policies to pregnant employees than were applicable to employees with other disabilities.

In one instance the doctor was called originally as a witness by EEOC, namely Dr. Andre E. Hellegers,

Professor of Obstetrics-Gynecology, Georgetown University, excerpts from whose testimony appears in Appendix A, pp. 1a-10a. Dr. Hellegers thereafter appeared as a witness for the complainants in a case pending before the New York State Division of Human Rights and excerpts from his testimony in that case are printed in Appendix C, pp. 13a-17a *infra.*

Dr. John C. Donovan, Chairman of Obstetrics and Gynecology at Strong Memorial Hospital in Rochester, New York appeared in a similar case as a witness called by Stromberg-Carlson Corporation. Excerpts from his testimony are printed in Appendix D, pp. 28a-36a, *infra.*

Dr. George Wilbanks, Chairman of Obstetrics and Gynecology at Rush-Presbyterian St. Lukes Medical Center, Chicago, was deposed as a witness called by General Electric Company and his deposition admitted in evidence in *Gilbert* v. *GE.,* U.S.D.C.E.D.Va. Civil Action No. 142-72-R. Excerpts from his testimony are printed in Appendix F, pp. 41a-47a, *infra.* The respective curriculum vitae of each of the foregoing doctors is also printed in the appendix (Dr. Hellegers at pp. 11a-12a; Dr. Donovan at pp. 37a-40a; Dr. Wilbanks at pp. 48a-50a).

Finally excerpts from a deposition given by Dr. William C. Keetels, Chairman of Obstetrics and Gynecology, University Hospitals, Iowa City, Iowa, called as a witness by the complainant in a case before the Iowa Civil Rights Commission involving mandatory leave as applied to a school teacher, is printed as Appendix H at pp. 51a-58a. Dr. Donovan identified Dr. Keetels as one of the most prestigious obstetricians in the country (p. 35a, *infra*).

All of the foregoing doctors agreed that there was no physiological data which would warrant a rule that women in pregnancies, who had no complications, should cease work any time prior to the onset of labor (Hellegers, pp. 1a, 4a, 15a, 16a-17a Donovan pp. 30a, 34a; Wilbanks, pp. 41a, 42a, 43a, 47a; Keetels, pp. 52a, 53a, 54a, 57a). Dr. Keetels in his testimony stated that the practice of allowing pregnant women to continue to work till term represents a change in accepted medical views which has occurred within the last four or five years but that the majority of the medical profession today is engaged in regularly advising normal patients that they may continue on their usual jobs until the onset of labor, with more and more doctors shifting continually to this practice (Keetels, p. 58a, *infra*). Dr. Donovan (p. 34a, *infra*) and Dr. Wilbanks (47a, *infra*) expressed their agreement with Dr. Keetels that the majority of doctors had now accepted the view that pregnant women could properly be advised to work until the onset of labor and that the medical profession was engaged in shifting to this view.

Women employed outside the home throughout pregnancy had no greater evidence of complications than those who stayed home (Hellegers, p. 15a, 17a, 18a, *infra,* Keetels, p. 54a). Indeed none of the doctors knew of any instance where working had a detrimental effect on either mother or offspring (Hellegers p. 17a, 18a, *infra* Keetels, p. 54a, *infra*). All four doctors pointed out that the hospitals were full of female doctors, interns and nurses who worked until they went to the delivery room, in many instances during the shift on which they were working (Hellegers, 2a, 8a, 9a, 16a; Donovan 33a, 36a, Wilbanks 42a; Keetels, 54a).

It was pointed out these doctors, interns and nurses continued their full duties throughout pregnancy, including the lifting of patients by nurses (Hellegers, 16a, Donovan, 33a).

Keetels expressed his view that there was nothing about the duties of a teacher which afforded any basis for requiring her to cease teaching at any time prior to delivery (pp. 53a-54a).

These doctors also agreed that it was today accepted medical practice to advise patients to continue throughout pregnancy their usual horseback riding, tennis, swimming, bowling and other sports activities (Wilbanks, p. 43a, *infra*). Dr. Wilbanks mentioned an instance when a pregnant patient's golfing was improved by her pregnancy (p. 43a, *infra*).

Not only did these doctors agree that it was acceptable medical practice today to advise a pregnant patient that there were no medical reasons for her to stop work until the onset of labor unless some complication arose, they agreed that there were often advantages to the continued employment of the pregnant female patient. Dr. Hellegers listed three different deleterious effects one or more of which might result from requiring a woman to cease work during pregnancy: (a) the loss of income might result in a deficient diet which could adversely affect the future offspring; (2) being home taking care of other children is often harder on a woman than her usual paid job; and (3) the psychological stress of doing nothing would be worse than any strain from her job. (Hellegers pp. 1a-20a. Cf. Donovan p. 33a). With respect to the effect of loss of income on the deficient product of the pregnancy Dr. Hellegers (pp. 19a-22a, 25a) pointed to

studies which showed a positive correlation between low income and infant mortality and between low income and smaller weight at birth. U. S. Dept. of Health, Education and Welfare, National Vital Statistics System Series 22, No. 15, Infant Mortality Rates, Relationship to Mothers' Reproductive History, p. 25, Table 16 (GPO April 1973); National Vital Statistics System Series 22, No. 8, Variation in Birth Weight, Legitimate Live Births, p. 23, Table 11 (GPO 1968).

Dr. Hellegers pointed out that the smaller birth weight reflecting a deficient diet indicated prematurity and often imposed a heavy burden on society because such a child was often handicapped by mental retardation, cerebral palsy or other central nervous system defects (pp. 2a, 21a, 23a-24a, 25a, 27a).

During the course of the examination of these witnesses almost every, if not every, suggestion which the attorneys for the Cleveland Board of Education advanced as an alleged medical basis for the school board's mandatory leave policy was rejected.

With respect to frequency of urination the doctors doubted that any great increase took place during pregnancy but even if it did, men voided so much more frequently as to make the increase insignificant. (Hellegers 6a-7a).

During the second and third trimesters miscarriages do not result from falling or fainting or being pushed. Almost 100 per cent of spontaneous miscarriages occur during the first three months, and hence are irrelevant to rules starting leave at the end of the fourth or fifth months (Hellegers, p. 8a Donovan p. 30a; Wilbanks p. 45a).

Morning sickness and nausea are likewise problems of the first three months not relevant to rules requiring leave beginning at the end of the fourth or fifth month or later (Hellegers p. 6a).

Overreaching with the arms can have no effect on the pregnant mother or fetus (Hellegers p. 10a, *infra*).

Lifting of heavy weights can have no effect on the pregnant mother or fetus. Pregnant mothers with older children regularly lift them during pregnancy. They also lift and carry heavy bags of groceries and other lifting involved in housework, without any effect on the outcome of the pregnancy (Hellegers p. 9a-10a; Wilbanks p. 42a *infra*).

Judgment is not affected by pregnancy (Wilbanks p. 43a, *infra*).

IQ is not affected by pregnancy (Wilbanks p. 43a, *infra*).

Coordination is not affected by pregnancy (Wilbanks p. 43a, *infra*).

To the extent that any agility is lost it results solely from weight gain and differs in no respect from the obesity effects which take place in males with overweight problems (Hellegers pp. 5a-6a, 8a-9a; Wilbanks p. 43a). And some women have no weight gain but go through pregnancy so unchanged that those referring to them say, "Gosh I hardly knew she was pregnant. She doesn't show." (Hellegers p. 10a).

The numbers of females who have complications in the second trimester is almost nil (Wilbanks p. 45a). The spontaneous miscarriages, which account for about 10% of the complications of pregnancy occur in the

first trimester (Donovan p. 30a; Wilbanks p. 45a). Thus rules requiring women to leave during the early or middle part of the second trimester are completely irrational.

And with respect to the third trimester, the range of complications which are disabling and arise only from pregnancy was fixed by Dr. Hellegers at 2% to 3% (pp. 22a-23a, *infra*). Dr. Donovan fixed all complications during all trimesters at 15% but testified not all of the 15% would be necessarily disabling (p. 30). Dr. Keetels testified that only 5% to 10% of pregnant women have any complications (p. 52a).

Admittedly a very substantial portion of the complications which are suffered by pregnant women are not due to pregnancy in any sense except that the weight gain brought out a preexisting thyroid, diabetic, liver or heart condition in the same way that a weight gain in a male could aggravate or bring out a previously undisclosed thyroid, diabetes, liver or heart condition (Hellegers 5a, 9a, 15a, 22a-23a; Donovan 31a-32a).

When the realistic facts of pregnancy are accepted, it becomes clear that the possibility 5% or 10% of the teachers may have complications, cannot justify a mandatory leave policy operative at to all teachers irrespective of the wishes or condition of the teacher.

With respect to period of disability following childbirth, all the doctors were agreed on a minimum of 7 to 10 days, an average of two to three weeks, and a maximum of six weeks (Hellegers, pp. 17a, 19a, 26a, 27a; Wilbanks, pp. 44a-45a; Donovan, pp. 33a-34a, 35a, 36a, 42a; Keetels, p. 56a). Here again the periods imposed by the school board rules are arbitrary and capricious, operate to deprive women of needed income and unduly impinge on their private right to have a

child without the imposition by the state of conditions which coerce them not to have children.[17]

II.

State action which denies a person of the right to work and continue to be paid her salary solely because she is pregnant, when she is as fully able to perform all the duties of her job as if she were not pregnant, violates the due process and equal protection clauses of the Fourteenth Amendment.

Once it is established that there is no medical basis for a rule requiring a pregnant employee to cease work before delivery simply because of pregnancy per se, it becomes obvious that the rule operates to deprive those to whom it is applied af the right to earn a living at their usual job without any rational justification for doing so. The right to earn a living at any of the "common occupations of life is an inalienable right." *Butcher's* v. *Crescent City,* 111 U.S. 746 (1884). Although the school boards have leave systems applicable to absences due to other disabilities, in no instance do the rules operate to require a man to be on leave when he is not in fact disabled from performing his duties. Only females are singled out for such treatment. Again since men who become obese and may generate disabling conditions of diabetes, thyroid and heart, are not placed on mandatory leave, whereas women whose pregnancy operates essentially the same as obesity, are forced on unpaid leave, the rule of the school board falls under the principle of *Truax* v. *Raich,* 239 U.S. 33, 41 (1915).

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[17] *Eisenstadt* v. *Baird,* 405 U.S. 438, 92 S.Ct. 1029, 1038 (1972). In *Gem Electric Co., Inc.,* 11 C.A. 684 (Sidney Wolff, Arbitrator, 1948), it was noted that unless maternity leave was available "the fear that bearing of children would mean loss of their job and all their seniority rights tend to deter them from parenthood."

Cruel hardship to the female and her family often results from forcing on her a period of five, six or more months of unpaid leave just because she is pregnant but at the same time fully able to perform her job and anxious to work for all of that period except from two to six weeks.[18] In its publication "The Myth and the Reality" the Women's Bureau states:[19]

> "Of the 33 million women in the labor force in March 1972, nearly half were working because of pressing economic need. They were either single, widowed, divorced or separated or had husbands whose incomes were less than $3,000 a year. Another 5.1 million had husbands with incomes between $3,000 and $7,000—incomes which, by and large, did not meet the criteria established by the Bureau of Labor Statistics for even a low standard of living for an urban family of four."

In most states the female employee forced on an unpaid maternity leave is unable to collect unemployment insurance. In 36 states the unemployment insurance laws contain a variety of different kinds of eligibility language disqualifying because of pregnancy and in some cases also for a period after childbirth.[20] In three states, Connecticut, Maryland and

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[18] Twelve days between December 8, 1970 and December 23, 1970 was the total number of days missed on account of childbirth by Mrs. Danielson, the female school teacher plaintiff in *Danielson v. Board of Higher Education*, 4 F.E.P. Cases 885, 888 (U.S.D.C. S.D.N.Y. 1972).

[19] U.S. Department of Labor, Employment Standards Administration, April 1973.

[20] U.S. Department of Labor, Manpower Administration, Unemployment Insurance Service, Comparison of State Unemployment Insurance Laws, Comparison Revision, No. 3, January 7, 1973, Table 407-Availability and Disqualification Provision for Pregnancy, 36 States.

Michigan, the disqualifying language, to the extent that it excluded women who were physically able and available for work, has been held to constitute sex discrimination in violation of the Fourteenth Amendment. *Jordan* v. *Meskill*, U.S.D.C.D.Conn., Civ. Action No. 15,671, Order of Judge Robert C. Zampani entered June 26, 1973; *Orner* v. *Board of Appeals, Employment Security Administration*, Superior Court of Baltimore, Case No. 132,572, Harry A. Cole, Judge, July 28, 1972; Michigan Attorney General's Opinion, February 18, 1972, CCH-EPG Par. 5051.

There is no federal temporary disability insurance system applicable to private industry except the Railroad Unemployment Insurance Act, 42 U.S.C. 351, *et seq.*, which as more fully explained hereafter has always defined sickness to include disabilities from pregnancy and childbirth. The latter law is applicable only to railway workers. Except for five states and Puerto Rico, the rest of the states lack any temporary insurance laws. The New Jersey[21] and Rhode Island[22] state disability laws cover pregnancy. The California Unemployment Insurance Code § 2626 exclusion of pregnancy related disabilities from its state disability insurance program has recently been held unconstitutional as sex discrimination violative of the equal protection clause of the Fourteenth Amendment by a three judge district court. *Aiello* v. *Hansen*, DLR 6-8-72 (No. 111) p. D-1, U.S.D.C.N.D. California May 1973.

Many women who are forced on unpaid maternity leave have no resources and must go on welfare so

[21] 43 N.J. Stat. Ann. Secs. 25, 39(e). Cf. *Iorio* v. *Board of Review*, 88 N.J. Super. 141, 211 A.2d 206 (1965).

[22] Gen. Laws R.I. Sec. 28-41-8.

that they and their families can survive until their period of enforced leave comes to an end and they can return to work. Of nine complainants who filed complaints against Stromberg-Carlson Corporation, Rochester, New York, N.Y.S.D.H.R. Cases Nos. CS-27069-72, one, Betty Williams, testified under oath and without contradiction at the hearing before the New York State Division of Human Rights on June 6, 1973, that when she was forced on unpaid maternity leave her husband was unemployed because the plant at which he had worked had closed some time before and the whole family had to go on welfare, which also entailed giving up her private physician and substituting, for prenatal care and delivery, welfare medical services. At the trial in *Gilbert* v. *General Electric Co.,* U.S. D.C.E.D.Va., Case No. 142-72-R, Sherry Osteen, who had been employed at the Portsmouth, Virginia plant of GE, gave undisputed testimony under oath in the federal district court on July 26, 1973, that she had no resources when forced on unpaid pregnancy leave in November 1972 and had to go on welfare, but before her first welfare check arrived her electricity was cut off for failure to pay the bill leaving her and her two year old daughter without light, heat, cooking facilities and refrigeration.

Among IUE's 100,000 female members, more than 400 members have filed charges with the EEOC or state fair employment practice agencies alleging that their employer engaged in sex discrimination by forcing them on unpaid pregnancy leave. At one plant alone, the Warren Ohio plant of General Motors Corp., more than 300 females filed such charges. These are the subject of the class suit, *Grogg* v. *General Motors Corp.,* U.S.D.C.S.D.N.Y. 73 Civ. 63.

The wide response of both school teacher plaintiffs and industrial workers to the opportunity to file suits and unfair labor practice charges challenging mandatory maternity leave attests to the wide-spread conviction on their part that they are victims of unlawful sex discrimination. Not only have the complaints of the female victims occasioned the numerous court decisions in school teacher cases cited in this brief but have occasioned the inclusion in the Guidelines on Sex Discrimination issued by EEOC (see p. 21, *supra*) and various of the state fair employment practice agencies (see p. 22, *supra*) of prohibitions on forcing leave of absence on females because of pregnancy or childbirth for periods when they are not in any wise disabled.

The EEOC and the state agencies administering laws prohibiting sex discrimination are unanimously agreed that an employer is guilty of discrimination because of sex when he places on maternity leave a female against her will when she is medically determined to be capable of performing all the duties of her job without injury to herself or her future offspring. In addition to the Guidelines on Discrimination Because of Sex issued by EEOC (see p. 21, *supra*) and by Illinois, Maryland, Minnesota, Pennsylvania, Washington and Wisconsin (see p. 22, *supra*), as far as we can ascertain, the other state fair employment practice agencies have followed the same interpretation of sex discrimination in making findings of reasonable cause, instituting court proceedings and filing briefs as amicus curiae. The New York State Division of Human Rights filed a brief as amicus curiae in *Grogg* v. *General Motors Corporation,* U.S.D.C.S. D.N.Y. 73 Civ. 63 in support of the IUE's contention

as a plaintiff in that case that requiring an employee to go on pregnancy leave at the end of the seventh month of pregnancy constituted discrimination because of sex in violation of Title VII, stating the position of the Division and citing applicable rulings as follows (Br. p. 3):

> "It has been the position of the Amicus in cases brought before it that a mandatory maternity leave policy which fails to consider the physical ability of the individual employee and which treats pregnancy and pregnancy-related disorders differently from any other form of disability deprives that employee of rights protected by the Human Rights Law. Disqualifying a physically capable woman from working because of a condition related solely to her sex is proscribed as a violation of the Human Rights Law. *Allison et al.* v. *Board of Education, etc.,* Case Nos. CS-21025-70, 20969-70, 20970-70; aff'd by the N.Y. State Human Rights Appeal Board (hereinafter SHRAB) Appeal No. 969, 5/14/72; *Arluck* v. *East Williston School District, et al.,* Case No. CS-22782-70, aff'd S.H.R.A.B. Appeal No. 1073, 6/14/72; *Plotz-Pierce* v. *N.Y.C. Board of Education,* Case No. CS-17943-69, aff'd. S.H.R.A.B. Appeal No. 1129, 2/15/73; *Curto* v. *E. Williston School District,* Case No. CS-25406-71, aff'd. S.H.R.A.B. Appeal No. 1355, 2/8/73; *Weiss* v. *Wantagh School District #23,* Case No. GCS-26112-72, aff'd. S.H.R.A.B. Appeal No. 1396, 2/15/73."

The Iowa Civil Rights Commission has similarly interpreted the Iowa Civil Rights Act in the case of *Heinen* v. *Johnston Community School District,* portions of the testimony in which are set forth in Appendix H to this brief, pp. 51a-58a *infra*.

The "great deference", which this Court recognized (*Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434 (1971)) should be accorded the guidelines issued by the EEOC, should, we submit, extend to holding that the Fourteenth Amendment has the same reach with respect to sex discrimination by state action.

The determination of Judge Merhige that leave practices applicable to pregnancy and childbirth should be based on the same principles as leave practices in connection with other physical disabilities (326 F.Supp. at 1161) is in accord with the Congressional determination in the Railroad Unemployment Insurance Act, 42 U.S.C. 351(1), that a day of sickness shall include a day during which a woman is disabled by pregnancy or childbirth. When the Railroad Unemployment Insurance Act was amended in 1946 to provide income maintenance for periods of absence due to sickness, Congress treated maternity benefits as a "special form of sickness benefit."[23] The Congressional scheme was to provide unemployment insurance benefits equally for a day an employee was able to work and available for work but could find no work and a day he was unable to work because of sickness. In the 1946 legislation a "day of sickness" was defined as follows (60 Stat. 722, 735):

> "§ 351. Definitions.
>
> "(k) * * * (2) a 'day of sickness', with respect to any employee, means a calendar day on which because of any physical, mental, psychological, or nervous injury, sickness, or disease he is not able to work or which is included in a maternity period."

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[23] S.Rep. 1710, 79th Con., 2d Sess., U.S. Cong. & Admin. News 1946, 1316, at 1319-1320 (July 12, 1946).

In 1968 the definition of a day of sickness in the Railroad Unemployment Insurance Act was amended[24] to its present form which in pertinent part is as follows (45 U.S.C. 351(k)(2)):

> "a 'day of sickness' with respect to any employee means a calendar day on which because of any physical, mental, psychological, nervous injury, illness, sickness or disease he is not able to work, or, with respect to a female employee, a calendar day on which, because of pregnancy, miscarriage, or the birth of a child, (i) she is unable to work or (ii) working would be injurious to her health."

The instant cases present only the issue of whether depriving a female of the opportunity to earn a living for an arbitrary period of time during her pregnancy and after she has recovered from childbirth constitutes sex discrimination in violation of the Fourteenth Amendment. It presents no issue as to whether it is also sex discrimination to fail to pay her during periods she is disabled by childbirth or the complications of pregnancy the same sick pay as is provided for all other disabiling conditions. However, the Congressional determination in the Railroad Unemployment Insurance Act that a day of sickness includes a day of disablement from pregnancy or childbirth demonstrates that the distinction between a day

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[24] Act of February 15, 1968, Pub. L. No. 90-257, Title II, § 201, 82 Stat. 23, amending 45 U.S.C. § 351, et seq. See H.Rep. No. 1054, 90th Cong. 2d, 1968 U.S. Code & Admin. News, 1636, 1638, 1670; 114 Cong. Rec. 218 (Senate, January 18, 1968); 114 Cong. Rec. 2182 (Senate July 18, 1968; 114 Cong. Rec. 1043, 1048 (House January 25, 1968). For a record of payments made to women on account of disabilities arising from childbirth and pregnancy see U.S. Dept. of Labor, Women's Bureau Bulletin, 272-1960, Maternity Benefits, pp. 21-24; Railroad Retirement Board, Annual Report 1971, pp. 22-23; Railroad Retirement Board, Annual Report, 1969, pp. 20-23.

an employee who is pregnant can work and the day she is disabled constitutes exactly the same distinction between a day a man can work and a day he is sick. To apply the rule differently to women and assert that because of pregnancy she cannot work even though not disabled is to discriminate because of sex.

Several distinguished arbitrators have ruled that leave and sick pay in connection with pregnancy and childbirth should be handled within the context of the usual rules applicable to leave for medical disabilities in order to avoid sex discrimination. In two cases, school board rules requiring a teacher to go on leave by the end of the fifth month of pregnancy regardless of ability to perform were held discriminatory and invalid. *Middleton Board of Education,* 56 LA 830 (John A. Hogan, Arbitrator, 1971); *Southgate Community School District,* 57 LA 476, 478 (David C. Heilbrun, Arbitrator, 1971).

In private industry the similar holdings of arbitrators date back two decades. *National Lead Co.,* 18 LA 528, 531 (Arthur Lesser, Jr., Arbitrator 1952) holding that the same rules for leave of absence as are applied for other temporary disabilities must be applied in case of disability due to childbirth and indicating the arbitrator believes any other rule would discriminate because of sex; *Republic Steel Corp.,* 37 LA 367 (Joseph Stashower, Arbitrator 1961) holding that continuity of service credit must be granted for period of leave for childbirth as this came within clause providing continuity of service was not broken by illness; *American Machine & Foundry Co.,* 38 LA 1085, 1088 (Wayne T. Geissinger, Arbitrator, 1962) where employees absent for illness do not forfeit vaca-

tion, women absent on maternity leave entitled to vacation; *Washington Publishers Ass'n.*, 39 LA 159, 160 (Judge Nathan Cayton, Arbitrator 1962) holding normal childbirth a sickness for purpose of sick pay.

If the school boards may use the mere fact of pregnancy to disqualify teachers for months before the expected day of childbirth, even though the teachers are adjudged by their doctors able to work, with no contra evidence, there is no logical place to draw the line between the allegedly unique qualities of a female which may be the basis of special rules and those which may not. The only sound line of demarcation is to determine by the evidence whether her unique features have any consequences which justify a special rule. The only consequence of pregnancy or childbirth which would justify denying a female an opportunity to work is her own inability to perform the job with the efficiency usually required or some danger to herself or her unborn child. The matter of danger to herself or her unborn child is a medical judgment. Folklore and mythology cannot properly be substituted for the science of medicine. We make no contention that any employee, whether public or private, should be required to continue any woman on the job before or after childbirth if in fact she cannot perform all her duties equally as well as when not pregnant or if in fact working creates any danger to her or her unborn child. In this connection it may be noted that a survey of employers as to whether any of them had ever had a workmen's compensation claim allegedly due to pregnancy, disclosed that no employer had ever known of a single such claim.[25]

[25] Prentice-Hall, Personnel Management—Policies and Practices, Report Bulletin 25, Vol. XIX (1972) pp. 460-461.

We merely urge that where, as here, there is no evidence of inability to perform or danger, it constituted sex discrimination in violation of the Fourteenth Amendment for the defendants to deny the plaintiffs the right to continue to teach and be paid their full salaries.

The courts have agreed that it constitutes sex discrimination in violation of Title VII to bar women from employment merely on the factually unsupported premise that they as a class are less dependable or efficient employees. Instead, an employer must provide such women individually the same opportunity to demonstrate their ability to perform the job as is provided other employees, including similarly situated men. *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711 (C.A. 7); *Weeks* v. *Southern Bell Telephone Co.*, 408 F.2d 228, 235-236 (5th Cir. 1969; *Rosenfeld* v. *Southern Pacific Co.*, 444 F.2d 1219, 1225 (9th Cir. 1971); *Cheatwood* v. *South Central Bell Telephone Co.*, 303 F.Supp. 754 (M.D. Ala.). As the Ninth Circuit observed in a hiring context, in *Rosenfeld* v. *Southern Pacific Company*, 444 F.2d 1219, 1225 (1971), the essence of fair employment is individual rather than class treatment:

> "The premise of Title VII * * * is that women are now to be on equal footing with men * * * Equality of footing is established only if employees otherwise entitled to the position, whether male or female, are excluded only upon a showing of individual incapacity * * * This alone accords with the Congressional purpose to eliminate subjective assumptions and traditional stereotyped conceptions regarding the physical ability of women to do particular work." (Citations omitted).

This Court has both in the race (*Carrington* v. *Rash*, 380 U.S. 89, 96 (1965)) and sex context (*Reed* v. *Reed*, 404 U.S. 71 (1971) held that the administrative convenience of applying a general rule that may be true as to many members of the class does not justify its application to anyone as to whom it is not true. Accordingly the imposition of a disqualification from work on the plaintiffs because some pregnant women cannot work constitutes prohibited sex discrimination.

In addition, as the United States Court of Appeals held in *Buckley* v. *Coyle Public School System*, 476 F.2d 92, 5 FEP Cases 773 (10th Cir. 1973), the school board rule invades the rights of plaintiffs La Fleur, Nelson and Cohen to privacy by requiring them to choose between having their salary for many months that the leave may drag out and having a baby at the price of foregoing pay for the months of enforced leave. We submit that the state here has not demonstrated the sort of compelling interest which justifies this invasion of the plaintiffs' fundamental right to choose to have a baby without having to forego income during months they are fully capable and ready to perform all the duties necessary to earn their salaries.

We submit that the following cases holding that similar school board regulations are invalid as in violation of the Fourteenth Amendment were correctly decided and should be followed by this Court, *Green* v. *Waterford School Board*, 473 F.2d 629 (2nd Cir. 1973); *Buckley* v. *Coyle Public School System*, 476 F.2d 92, 5 FEP Cases 773 (10th Cir. 1973); *Bravo* v. *Board of Education of City of Chicago*, 345 F.Supp. 155 (N.D. Ill. 1972); *Health* v. *Westerville Board of Education*, 345 F.Supp. 501, 505 (S.D. Ohio 1972); *Williams* v.

San Francisco Unified School District, 340 F.Supp. 438, 443; *Pocklington* v. *Duvall County School Board*, 345 F.Supp. 163 (N.D. Fla. 1972); *Monell* v. *Department of Social Services*, 4 FEP D 5936 (S.D. N.Y. 1972); *Garner* v. *Stephens*, Civil No. 6855 (N.D. Ky. filed December 1, 1972). Compare the similar holding of the Supreme Court of Pennsylvania: *Cerra* v. *East Stroudsberg Area School District*, 299 A.2d 277, 5 FEP Cases 480 (Pa.SupCt. 1973).

III.

The practice of an employer which requires a female employee to be absent from work without pay on account of pregnancy and childbirth for a longer period than is medically necessary constitutes an unreasonable impediment to the ability of the female to compete in employment with males.

The Fourth Circuit placed controlling weight upon its assumption that there is no "possibility of competition between the sexes in this area", 474 F.2d 397. But the imposition of long periods of unpaid leave on a female teacher because she is pregnant does impose an impediment to her ability to compete with male employees. Continuity of tenure in the teaching world is a valuable right. It often provides the standard for promotion to higher paying jobs or establishes the basis for increased pay. For a female in an industrial plant to suffer loss of seniority, either by fixing a new hire date or deducting time off from her total seniority, places her at a competitive disadvantage with males. Males hired on the date of her original employment have a higher seniority date and move on to advanced pay or advanced classifications while she is not eligible to the same advancement because of her reduced seniority.

And looking to experience actually gained on the job, the female placed on leave does not get experience during the period of her leave, while the male employee, never forced out on leave by his male attributes, accrues valued experience.

Similarly the loss of earnings during the period of enforced leave may make it impossible for the female to take courses she planned to take whereas the male can use his earnings to pay for courses leading to advanced degrees and resulting higher status in the teaching profession.

We submit that by any analysis of the effects of the forced unpaid leave on the female, it will be found that she is disadvantaged in a respect in which she and the male teachers are in competition.

CONCLUSION

For the foregoing reasons it is respectfully urged that this Court should affirm the decisions of the Sixth Circuit in the *La Fleur* case (Case No. 72-777) and reverse the decision of the Fourth Circuit in the *Cohen* case with directions to affirm the judgment entered by Judge Merhige in the district court on May 17, 1971.

WINN NEWMAN
RUTH WEYAND
1126 16th Street, N.W.
Washington, D. C. 20036
Phone: 202-296-1200

Attorneys for International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, as Amicus Curiae

July 31, 1973

APPENDIX

APPENDIX

APPENDIX A

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

Docket No. 19143

In the Matter of:

Petitions filed by the
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

Testimony of Andre E. Hellegers

(called as a witness by the Equal Opportunity Commission on February 14, 1972 in hearings which considered among other issues, the leave policies of the American Telephone and Telegraph Co.)

My name is Andre E. Hellegers. I am presently Professor of Obstetrics-Gynecology, Professor of Physiology-Biophysics as well as the Director of Population Research at Georgetown University. In addition I am currently president of the Perinatal Research Society. A listing of my further qualifications can be found in the complete curriculum vitae attached hereto.

There are to my knowledge no physiological data which warrant a rule that women in pregnancies should cease working. It should be recognized that if a woman were to develop diabetes, hypertension, or certain other conditions in pregnancy, then it would be possible that a stoppage of work would become necessary, but this in no way differentiates pregnancy from nonpregnancy, since this statement would be equally true for nonpregnant women, or indeed for men. No medical evidence can be adduced for the need to cease working in pregnancy. Indeed this may be deleterious in some circumstances in which:

1. Loss of income would occur, which might decrease the quality of the diet consumed in pregnancy.

2. A woman has several children, in which case her house work is likely to put more strain on her than a regular job in the labor force.

3. The psychological stress of doing nothing could be worse than that of being gainfully employed.

The Georgetown Obstetrical Service's advice regarding the desireability of working in pregnancy is individualized for every patient as it would be for nonpregnant patients, male or female, who ask whether they are capable of doing a particular job.

It is of some significance that women doctors and nurses, who are working on the obstetrical and other services at the hospital often continue working right up to the day of delivery. This of course would not be so if the medical profession thought that working in pregnancy was contra-indicated.

Finally, in the only large-scale analysis of work in pregnancy, involving close to four million women, women, without incomes had a poorer outcome of pregnancy than women with incomes. The positive correlation between higher social classes and incomes with better pregnancy outcome, and lower social classes and income with worse pregnancy outcome is of course well known.

Knowingly, and in the absence of disease, to remove the opportunity for the income-producing activity from women is therefore to expose women and their unborn children to unnecessary reproductive stresses, unless financial compensation is given.

* * * * * * * * * *

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

Whereupon,

Andre E. Hellegers

was called as a witness and, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Copus:

Q. Would you state your name, please? A. Andre E. Hellegers.

Q. What is your business address? A. 3800 Reservoir Road, Georgetown University Hospital.

Q. What do you do there? A. I am Professor of Obstetrics and Gynecology.

Q. Do you have before you a document entitled
1090 "Testimony of Andre E. Hellegers"? A. I do.

Q. Did you prepare that document or was it prepared under your direction? A. I prepared it.

Q. Do you have any changes or corrections to make at this time? A. No, I don't.

Q. Do you, then, adopt this testimony as your own testimony and is it true and correct to the best of your information, knowledge and belief? A. That is correct.

Mr. Copus: I now offer Dr. Hellegers for Voir Dire and Cross-Examination.

* * * * * * * * * *

1093 Cross-Examination

By Mr. Levy:

Q. At pages one and two of your testimony, you mention diabetes, hypertension or certain other conditions in pregnancy as making it possible that a work stoppage would become necessary.

Wouldn't such conditions as diabetes and hypertension make it probable if not mandatory to stop work?

1094 A. It would depend on how you would define the diabetes and the hypertension.

There are a lot of non-pregnant men and women with diabetes and hypertension working. That in itself is not a contra-indication to work. If it were, I think a lot of executives would be out of jobs.

Presiding Examiner: How about lawyers.

The Witness: Yes, and doctors.

By Mr. Levy:

Q. Can you identify for us the certain other conditions to which you refer in that sentence? A. Congenital heart disease, heart failure, cancer, any kind of thing that would make anybody stop working.

Let me put it that way.

Presiding Examiner: Are those types that would be aggravated by a pregnancy?

The Witness: No, not necessarily. I am sorry, I did not have in mind a particular aggravation by pregnancy. I had in mind there are obviously pregnant women who should not work as obviously there are men who should not work.

By Mr. Levy:

Q. Dr. Hellegers, at page two, you seem to state categorically that there is no medical evidence for the need to cease working in pregnancy on the one hand and yet, you make reference to the Georgetown Obstetrical
1095 Services policy of being individualized for every patient. Are these two statements not inconsistent? A. No, I don't think so. Perhaps I can explain it a little lower down, even.

One has to individualize in every man and in every woman who comes to consult you, whether they should or should not work. What I am trying to say here is there is nothing inherent in the pregnant state that prevents some from working and the individualization simply means I

would say to someone with a massive brain tumor who cannot see straight they might be better off not driving a car.

That is what I meant by individualization.

Q. What are the bases on which the Georgetown Obstetrical Services make an individualized determination whether a patient is capable of doing a job? A. I would say if a patient has hypertension which is out of control, if a person has diabetes which is out of control, and requires administration to a hospital and administration of insulin, then obviously, you would admit her to a hospital. You would do the same thing for a man.

Q. Does pregnancy commonly put stress on such organs as the kidney and the liver? A. No, it doesn't; I think it is more by virtue of weight and not by virtue of preg-
1096 nancy. It is akin to an obesity situation.

Q. Couldn't continuation at a job involve exposure to toxic substances which would produce no harm to a normal non-pregnant woman prove to be harmful to a pregnant woman? A. It is an interesting question. My answer to that would be factually yes, providing that the exposure be in the first 12 weeks of pregnancy which is namely when the organs are being formed.

The difficulty with obstetrical practice is that we have yet to see patients after the time for the damage of irradiation in chemicals has gone by. It is an embryological problem that arises in the first 12 weeks.

Q. I was asking that question as to harm to the pregnant woman herself rather than the fetus she was carrying. A. I don't think that pregnancy increases the harm which a noxious agent can do to a woman. Let me put it that way.

Q. But you would say that continuation of jobs involving potential exposure to various kinds of radiation or toxic matters or ultra-sound could be potentially harmful to the fetus?

* * * * * * * * * *

1099 Q. Can't factors associated with normal pregnancy such as increased fluid retention, nausea, swollen ankles, bladder pressure, generally lessen agility because of this 25-pound weight?

Can't some or all of these result in serious diminution in the speed and efficiency required for the performance of certain jobs? A. Let me put it this way: The water retention in pregnancy is amniotic fluid is 1000 CCs which would be two pounds of water sitting there and then by and large something like five pounds of water which is excess retained in pregnancy and excreted afterwards, so we are talking about something like seven pounds of water which is a heck of a sight less than is carried by most obese men.

I cannot ascribe it to pregnancy but I can ascribe seven pounds of water retained in pregnancy. I cannot ascribe any differences than from men who have had nephritis, to beer drinkers, whatever else retains water, or even salt eaters.

If someone has a particular predilection for salt, they are going to stash away a few pounds of water.

1100 Q. What about some of the other factors that I mentioned? Is morning sickness or nausea fairly common or at least not uncommon in the first trimester of pregnancy? A. That is correct, yes.

Q. Could that result in diminution of the efficiency required for the satisfactory performance of certain jobs? A. Yes, I would think it would be in the same ball park as men with ulcers, burping, nausea. Understand me, I am in favor of good health. My testimony was not directed to whether there aren't changes in a woman's body in pregnancy. Obviously there are. My testimony was directed to the question of work.

Q. I am just trying to explore certain parameters of your views.

What about bladder pressure? Is it not uncommon for the developing fetus to impose greater pressure on the bladder than in the normal non-pregnant state? A. Yes,

it does but women, by and large, void less than men. If voiding in frequency and quantity of urine becomes an issue, then people would say men are in more trouble than women because they void more. That is in terms of CCs of urine produced per day is more than women. I cannot ascribe that to a disease.

1101-A Q. If there were a job that required continued attendance at a station for let us say hour-long intervals and a normally pregnant woman could not sustain the bladder pressure for that long. This could interfere, could it not, with the efficiency of that operation? A. Yes, if you have to go to the john, you have to go to the john, man, woman, pregnant woman or anyone else. I must agree.

Q. Again, Doctor, are swelling of the ankles fairly common in pregnancy? A. Yes, it is.

1101 Q. Can that not possibly have an effect on the satisfactory performance of certain jobs which would call for speed of movement, locomotion? A. It is impossible to answer that.

Q. You are using void in a different sense. A. Yes. It is a kind of theoretical statement which asks are our ankles which are four inches in circumference any better than ankles which are six inches in circumference.

It is an impossible question for me to answer. I don't know if any job specification goes to the circumference of ankles except in the chorus line.

Q. At page 2 of your testimony, Doctor, you suggest that it is of some significance that women doctors and nurses at the hospital often continue right up to the day of delivery.

Are not the job requirements and potential hazardous exposures quite different from those of telephone workers than doctors and nurses? A. That is not within my competence to answer. That would mean I know the full telephone business which I do not.

I am saying there is nothing inherently in the pregnant state that eliminates work as a factor and it is best shown

that those who most deal with pregnancy, namely obstetricians, nurses, pediatric interns, continue right up to delivery time.

1107 By Mrs. Baker:

Q. You mentioned in your responses earlier that during the first trimester the danger seemed the greatest. Was that to the child or to both the mother and the child? A. To the child.

Q. I think we are talking perhaps about three different areas of possible danger and harm. One would be to the baby, one would be to the mother and the third one
1108 might be others resulting from the mother's condition.

For instance, a woman who may be operating and might faint, might cause some harm to her fellow workmen. The question is: Would this harm be any greater than if a man fainted on a job?

Is there something particular about pregnancy which means when something happens to the woman it is any worse than if it happens to a non-pregnant human being? A. Let me answer two ways: For the pregnant woman to faint and fall is to herself apart from the fetus no more dangerous than it is for a man to fall.

Q. To those around her? A. My sort of crazy mind would say would you rather have a 100 pound woman fall on top of you or a 250 pound man?

More to the point would be your third category which is the fetal category and from the falling point of view, if fainting or falling in the first trimester could make you miscarry or something like that, you know we wouldn't have the abortion legislation fights that we have now today because every woman would drop down and abort it.

Unfortunately, or fortunately, one cannot expel a fetus by falling or all legal abortionists would be out of business.

Q. Do you find that all women lose tremendous amounts of dexterity, stamina, during pregnancy, or is this subject

to individual variation? A. It is individual. It de-
1109 pends on the weight gained and it depends on the starting weight.

Let me try to explain this. If a woman is pregnant and weighs 150 pounds to start with, the 20-pound weight gain on her represents obviously much less of a problem than if the 20-pound weight were to start in a girl who weighed 80 pounds.

It is a fraction of weight carried so one can already begin to individualize on that one in very much the same way as sudden weight gain among men.

A 100-pound man who turns obese is affected more than the man who is obese to start with.

Q. Are all pregnant women subject to a tremendous amount of edema? A. No, it is usually that category of women who have what is called toxemia.

Q. Is exercise contraindicated in edema? A. No.

Q. Can a pregnant woman lift, let us say, 20 pounds when pregnant if she is capable of doing so?

Will it harm her or her child if she is lifting 20 pounds four times a day and she keeps lifting 20 pounds four times a day, should she be able to do this through her pregnancy?

It is like lifting a cow, you can never start that
1110 way. A. I am bothered by the generality of the question. Lifting 20 pounds of weight is different for the 80-pound woman from the 160-pound woman.

Now let me answer it is contraindicated to lift children anyone can go into any American home where there is a first child and the second child and you see pregnant women lifting children.

Or, you can go to the supermarket and find pregnant women holding onto two pounds. There are pregnant nurses who lift their patients. They are some savvy, of course, about lifting.

Q. Can pregnant women overreach with their arms? Is there anything about pregnancy that would indicate that a woman should not reach right through pregnancy?

A. There is nothing in the pregnancy that tells she could not reach but I remind you again she does carry the weight in front of her and that is an obvious fact.

Nothing can happen to her. She can't have the baby or go into labor.

Q. And that would depend on the women's own feeling to do it every day? Provided they can get up to the desk or whatever, if they are physically capable because of the weight in front of them— A. There is nothing short in the pregnancy other than the physical mass that contraindicated bending, lifting, and so on.

1111 Q. Just because a woman is nine months pregnant, there is tremendous variation on how much incapacitated, if any, they are? A. So many women have babies of which we say, gosh, I hardly knew she was pregnant. She does not show, is the common expression. Others show very clearly.

Q. Would the same thing go for bending or spending a number of hours sitting? A. Sure. Pregnant women do hardly anything but that when they are home, bend, lift —that is the common state of a pregnant woman.

Mrs. Baker: I think that is all.

Presiding Examiner: Do you have anything further, Mr. Copus?

Mr. Copus: No, Mr. Examiner, we have no questions on redirect.

Presiding Examiner: Thank you, Doctor.

You are excused.

• • • • • • • • • • •

APPENDIX B

Curriculum Vitae—Andre E. Hellegers, M.D.

BORN:

June 5, 1926, Venlo, the Netherlands.

MARRIED:

Charlotte Frazer Lindsay Sanders, 4 children.

EDUCATION:

Stonyhurst College, England, 1940-1944
Edinburgh University Medical School, 1944-1951
L.R.C.P., L.R.C.S., L.R.F.P.S., 1951
Belgian National Boards, Brussels, M.D., 1952
Diploma of Aviation Medicine, Paris University, 1953.

HOUSE STAFF:

Department of Obstetrics and Gynecology, The Johns Hopkins Hospital, 1953-1956, 1959.

FACULTY APPOINTMENTS:

Intern to Associate Professor, Johns Hopkins University, 1953-67
Josiah Macy Research Fellow in Physiology, Yale University, 1956-57.
Lecturer in Population Dynamics, Johns Hopkins University, 1966-
Professor of Obstetrics-Gynecology, Georgetown University, 1967-
Professor of Physiology-Biophysics, Georgetown University, 1969-
Director of Population Research, Georgetown University, 1971.

OTHER ACTIVITIES:

Member, Josiah Macy Foundation High Altitude Expedition, Peru, 1958.
Senior Research Scholar, The Joseph P. Kennedy, Jr. Memorial Foundation, 1961-67.
Member, Research Advisory Committee, United Cerebral Palsy Foundation, 1964-1970.
Consultant, Office of the Secretary of Health, Education, and Welfare, 1964-65.
Member and Deputy Secretary General, The Papal Commission on Population & Birth Control, 1964-1966.
Member, President Johnson's Committee on Population and Family Planning, 1968.
Technical consultant, Population Reference Bureau, 1970-
Member, Study Section on Human Embryology and Development, NIH, 1967-1971.
Member, National Advisory Child Health and Human Development Council, NIH, 1971-

SOCIETIES:

A.O.A.
Member, American Gynecological Society, 1971.
Honorary Fellow, South Atlantic Association of Obstetricians and Gynecologists, 1971.
Member, The Society for Gynecologic Investigation (President, 1968).
Member, The Perinatal Research Society (President, 1971).

EDITORIAL BOARDS:

Georgtown Medical Bulletin, 1968-
American Journal of Obstetrics & Gynecology, 1963-70.
European Journal of Obstetrics & Gynecology, 1971-
Gynecologic Investigation, 1971-

APPENDIX C

Testimony of Dr. Andre E. Hellegers, M.D.

(Called as a witness for complainants in *Avery* v. *General Railway Signal Corp.*, N. Y. State Division of Human Rights, Complaint Case Nos. CS-27503-72, CS-26324-72 and *Franklin* v. *Stromberg Carlson Corp.*, Case Nos. CS-27069-72, CS-27071-72, CS-27068-72, in Rochester, N. Y., on June 8, 1973, which present issues as to whether the following constitute unlawful discrimination because of sex in violation of the New York State Human Rights Act, N. Y. Executive Law, Article 15, Section 296: requiring a pregnant employee to go on unpaid leave during the latter months of pregnancy and remain on unpaid leave following childbirth without regard to ability to work; cancellation of Blue Cross and Blue Shield at time employee goes on leave depriving employee of coverage for prenatal care and delivery unless employee assumes payment of premiums although employer pays all premiums during periods of leave for other disability and covers prenatal and delivery expenses for wives of employees; no income maintenance for absences due to pregnancy-related disabilities or income maintenance for shorter periods than provided for other absences.)

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140 André Eugène Désiré Joseph Hellegers was called as a witness on behalf of the complainants, and having first been duly sworn by the Hearing Examiner, testified as follows:

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141 Direct Examination by Miss Weyand

By Miss Weyand:

Q. Is this a Curriculum Vitae that you prepared? A. Yes. I certainly prepared it.

Q. Have there been certain changes since the date you prepared that? A. There have been additions, yes.

Q. Would you state what those are? A. Well, I'm presently the Director of the Joseph and Rose Kennedy
142 Institute for the Study of Human Reproduction and Bio-Ethics at Georgetown University. The others would be minor additions.

Q. What is involved in the studies that you mentioned at the Kennedy Institute? A. The Institute has three divisions. One of which deals with the biology and physiology of reproduction. The second division is a center for population research which deals with the sociology of reproduction and its consequences and the third division deals with ethical problems in modern biology.

Q. Does this research include analysis of difference in perinatal mortality, prematurity, child spacing and all related problems? A. Yes, it does.

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Q. Any others that should be mentioned? A. Economic consequences, migration, population growth, illegit-
143 imacy. All the social aspects of reproduction.

Q. What are the various biological interests to which your research is directed? A. Well, my laboratory research is directed towards changes in maternal and fetal physiology in the course of pregnancy. My sociological research is overwhelmingly directed towards perinatal mortality, weight of infants, illegitimacy statistics, child spacing versus mortality versus I.Q. of infants. So really the quality of human reproduction as it relates to quantity, and in its own right.

Q. Apart from the academic research position which you have mentioned, are you also a practicing gynecologist and obstetrician? A. I do absolutely no gynecology that deals with non-pregnant women. In terms of obstetrics I only see patients I'm asked to see by consultation so they're abnormal cases.

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144 Q. Has it been your experience that patients who continue to be gainfully employed on a full time job outside the home have a greater incidence of complications during pregnancy than women who stay home? A. No, it has not been my experience.

145 Q. Have you had occasion to advise pregnant patients with respect to whether they should continue their employment during pregnancy? A. Yes. I would say almost every employed woman asks the question.

Q. What advice do you give such pregnant patients? A. We individualize it. As a general principle one would follow that they may continue to work unless there is a contra indication.

Q. Is there, to your knowledge, any physiological data which warrants a rule that at any given stage of pregnancy the pregnant woman should cease work? A. During delivery I would say.

Q. Aside from that? A. I think if you would in labor.

Q. In addition to those who are in labor, is there any physiological data? A. I think up to labor, if no other complications set it, one would advise that the wo-

146 man could continue, given common sense. You wouldn't want a woman pilot to continue flying a plane until the day prior to delivery. One follows common sense.

Q. Is a pregnant woman more susceptible or less susceptible to disease during her pregnancy than when she was not pregnant? A. There are certain diseases which are aggravated in the state of pregnancy mainly as a result of the weight increase that occurs in pregnancy. Classical examples would be diabetes I'd say. Thyroid disease might be. Then there would be certain conditions which might exist in the non-pregnant state which would be aggravated like an aneurysm or a ballooning of an artery that might be aggravated by virtue of rapid weight gain and change of pressure. So they would be essentially aggravations due to rapid weight gain.

Q. Can any medical evidence be educed for the need to cease work because of pregnancy? A. Because of pregnancy per se?

147 Q. Yes. A. None that I know of.

Q. Are there circumstances in which it may be deleterious for a pregnant woman to cease work? A. In which it would be deleterious for her to cease work?

Q. Yes. A. That would depend on her family situation. I think the average woman in pregnancy would much rather work than take care of several children at home. I think the average woman, if she was short of money, would much rather have the money than to cease work. So in that case one would have to say it would depend from case to case what woman one was dealing with.

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148 Q. Have you had experience with pregnant females who did not take leave prior to going into labor? A. Yes. It's virtually universal in obstetrical services, obstetrical nurses, pediatricians, women pediatricians, those would be the ones that on an obstetrical service you would see. I don't know what happens in internal medicine, but in OB GYN, pediatrics, you see persons working right there.

Q. Is there any reason to believe that these female doctors, interns and nurses are continuing to work
149 in opposition to what would be the best medical advice? A. It is a question of don't do as I say, but as I do. They themselves—

Q. Are they continuing to work in conformity with their own notions of what is good professional medicine as far as you understand? A. Yes. I think they do this because they see no harm in it. They want the income. I would expect if their obstetricians said now you have to stop they would then stop.

Q. Their own judgment as to the right to work is in conformity with established medical opinion? A. Yes. I think in modern practice one wouldn't tell a woman to

stop working unless there was a medical indication to stop working.

Q. Based on your experience, how many weeks after childbirth do you usually certify a patient as capable of going back to her job? A. Well, I don't really
150 certify them because as I said, I'm only called in on consultant basis, but the conventional, old fashioned system would be six weeks. The modern system would individualize it depending on the need of the person both for the job, for the money that she'd have, for the job that she would be in and at that point I woud say two weeks would be perfectly adequate.

Q. Do you have any idea what the average period is? A. I don't know. I haven't seen any study that average it, I think the only study that might be relevant is that there is increasing evidence that the recurrence of the return to normal in terms of some parameters that you can measure is now occurring earlier. That is to say ovulation occurs earlier, menstruation occurs earlier after childbirth than it used to do say forty years ago.

Q. Not merely a matter of medical practice,
151 but a change in what is physiologically occurring in women; is that correct? A. It is part that and it is part, oh, how should I put it, a changed ethos of reproduction. In old days I suppose women were put in cotton and kept in bed and grandmothers flew in and aunts flew in to help and women were thought to be very delicate creatures. But in relation to production and with increasing numbers of women in the work force, it has become obvious this is a rather silly way of looking at things.

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152 Q. Do you know of any instance where you determined that her working had had a detrimental effect? A. No, not in a cause and effect relationship.

Q. Do you know of any record of other doctors having recorded that working had had a detrimental effect? A.

Oh, I'm sure that doctors have said so and I am sure there would be some who would ascribe it to the phase of the moon or to an astrological chart or whatever one likes, but I don't think there's any evidence
153 that I can think of which showed a cause and effect link between the work done and the outcome except as I said in terms of detrimental effects on the fetus in the first thirteen weeks of pregnancy.

Q. And those can occur in other instances than radiology. Are there other instances where there is injury during the first thirteen weeks? A. I would think there might be chemical fumes. I would think I wouldn't want to see somebody working in an environment of carbon dioxide, but that would be a general species of do not be around poisonous substances during the developmental stages of a fetus.

Q. That is just the first trimester? A. That's correct.

Q. And aside from chemical and radiological instances you thing of no other instances? A. I can't think of any offhand.

Q. Does normal child— A. Might I qualify that?
154 I'm excluding, constantly, common sensical thing. If you are a professional parachutist you don't go jumping out of airplanes at nine months of pregnancy. There's an element of common sense here.

Q. Does a normal childbirth in and of itself always disable the new mother for a number of hours or days? A. Yes, I would say women are disabled during the delivery and shortly thereafter.

Q. How long on the average is the period following childbirth that the new mother is disabled from carrying on her customary duties? A. I think that's largely culturally determined. I expect in Africa they start off in the bush taking after existing children right away. In the United States we keep them in the hospital three days nowadays. What happens to women when they go back home and have no grandmother around? I certainly

know a lot of them who have started their household work again from the time they came home. Depends
155 pretty much on what their husbands do.

Q. Is there any indication that this is deleterious, that they should start their housework soon as they come out of the hospital? A. I know of no studies that would show that. The conventional attitude still is that any woman who has just delivered a child is entitled to a rest and it's probably the only excuse most of their husbands give them for ever resting. I think it's more mythology and cultural practice than it's proven biological disability.

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166 Miss Weyand: I would like to have marked as Complainants' Exhibit number 16 for identification a pamphlet entitled "Infant Mortality Rates, Rela-
167 tionship with Mothers Reproductive History" published by the United States Department of Health, Education and Welfare, Vital and Health Statistics data from National Vital Statistics System Series 22 Number 15 Issued by the Government Printing Office April 1973.

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By Miss Weyand:

Q. Have you had occasions to talk to one of the individuals who have prepared this or participated in the preparation of this study? A. Yes. This is Mary Grace Kovar.

Q. And do you know the circumstances of this
168 study? A. Yes. It is something that the NCHS which is the National Center for Health Statistics does intermittently which is to take a cross sample of the population and then determine a number of parameters that effect outcome of pregnancy and this was one of those. They've been doing this for quite a while.

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Q. Yes. Turning to Table 17 on Page 25, this table shows what? A. It is a table that deals with what infant death relates to, in terms of income of the mother involved. I shouldn't say the mother involved, but
169 the parents involved, family income.

Q. And is this one of the criteria which has been used in social economic studies to determine the effects of conditions existing prior to birth? A. Well, what it states is what we've known for a long time which is that the lower the income of an individual the higher the infant death rate and the higher the income the lower the infant death rate. I'd add this is stated in this table in terms of family income, but one can do it against education of the parents or against a series of parameters that deal with socio-economic development. One could factually do this internationally by testing less developed countries against more developed countries and so forth.

Q. In addition to infant death, what other measures are used on the success of the prenatal care in terms of what happens to the infant or what kind of an infant is produced? A. Well, one of the problems of doing
170 it against infant death alone is that the major cause of infant death is prematurity. When one has prematurity the question always is whether it is a pregnancy that ended too soon or whether it is a pregnancy that ended at the normal time, but produced too small a baby. So the second test that one would apply would be not just the infant death rate, but one would apply an indicator that would be th weight of the infant produced by a given week of pregnancy.

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178 Miss Weyand: I would like to have marked as Complainants' Exhibit 17 for identification another issue in this same series. This issue is entitled "Variations in Birth Weight, Legitimate Live Births" and it's number 8 in series number 22.

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179 By Miss Weyand:

Q. Dr. Hellegers, will you look at table 11 on Page 23 and tell me whether this is a table that reflects a study which eliminates the problem of prematurity which you stated affected some of these studies in this regard? A. Yes. This is a table which instead of showing the outcome of the pregnancy by mortality tested against the income of the mother shows the outcome in terms of the weight of the infant produced as against the income of the mother. It is in a sense no different than the other one in that both show the outcome in the infant as a reflection of the state of the mother.

180 So it is the state of the mother affected by the lack of the income, producing in the one case infants that have a bigger chance of dying and in the other circumstance infants having a bigger chance of being small.

Q. Now, could you state in terms of the medical evaluation of the health of a child what weight has to do with it? A. Well, that's very difficult thing to do. Let's put it this way; the greater the degree of prematurity by either duration of pregnancy or by weight of the infant the greater the chance of a handicapping condition existing in the infant. Meaning by handicapping condition mental retardation, cerebral palsy, central nervous system defects. I want to point out that incidence of cerebral palsy or mental retardation would not increase if an infant's weight instead of being thirty five hundred grams were thirty three hundred grams. The lower one gets on the weight scale the more important it is

181 to have the extra hundred or two hundred or three hundred or four hundred grams, however many you can get in there. So it's not correct to place an absolute correlation between all greater weights and all lesser weights in terms of the chance of a given child being handicapped, but as a class the smaller the children are the greater the chances of the after effects of prematurity, mainly retardation and so forth.

Q. Now, these two studies, tables which we have directed our attention to, indicate a positive correlation between one instance death and low income and the other one small weight and low income. A. That's correct.

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184 Q. Thank you. Is there available, as far as you know, any reliable data as to length of time females on the average are disabled by normal pregnancy and childbirth? A. No, not that I know of and I would have to add increasingly less so for the simple reason that we used to follow a mythological practice that stemmed from an age in which, as I tried to say earlier, women in child bearing were put on a pedestal and everybody bowed down to it. All that one can say is that one sees increasingly the practice of work-
185 ing longer and longer in pregnancy and returning to work earlier and earlier. It's in my opinion a reflection of the fact that women are taken into the work force and are given an opportunity to earn and like to earn whereas if one couldn't earn by going to work one might as well stay on one's back and enjoy it.

Q. Is there any reliable data available as far as you are aware of the percentage of women who have entirely normal pregnancies and childbirth as compared to those who have complications?

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186 A. We commonly say that about ten percent of pregnancies would have some complications that we would be worried about. So one would say ninety percent no problem. Ten percent a problem.

Q. Now, these ten percent that have a problem is there any way of indicating how many of those are problems which would have arisen apart from pregnancy as distinguished from those that arise from the pregnant condition? A. Yes. Let me answer in two parts. One would be disabling conditions which could not occur in the non-pregnant state or in men and those I mentioned earlier

as complications due to the presence of a placenta or presence of a fetus. I would guess I could look it up.

My guess would be that that would be two to three
187 percent. That's off the top of my head. I don't want to be held to that in a scientific manner. There there would be complications in which the pregnant state, by virtue of its weight gain situation aggravated or brought out an underlying disease which was already present in the non-pregnant state like thyroid disease, incipient hypertension, incipent diabetes and so forth. In my own thinking I don't think of those as complications of pregnancy. They are conditions present in people brought out by the process of rapid weight gain and I couldn't put a figure on that, actually. There would then be a remaining fraction which would represent precautionary measures taken by a physician as a result of something in which he does not know whether it factually is a meaningful disease or not, and that might be such a thing as an episode of bleeding. It might be an episode of loss of water in which he thought that the

membranes might have ruptured, but factually the
188 woman was voiding and, again, I don't know whether one wants to call that a disease or doctor misdiagnosis, but I think the fairly standard figure would be given that we figure approximately ten percent of all pregnant women to have a complication demanding a physician's examination, diagnosis, prognosis and advice. Q. Would you know of any reliable data that would indicate how many days out of a nine month pregnancy these type of conditions, ten percent have, would disable? A. No, I don't.— — —

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200 Q. Can you state from a medical point of view the consequences of removal from a pregnant woman of the opportunity for income producing abilities without substituting financial compensation? A. Yes. I think it depends on her income scale. I doubt that the

wife of Senator Kennedy would be markedly affected.

201 If the loss of that income puts one in a family income category which takes one into a health situation that is clearly shown to produce worse infant outcome, smaller infants and so forth, death and smaller weight. This is a sign that that woman is indeed less healthy than if she has been able to have the nutrition or whatever it is that is derived from income. So to the extent in terms of any health parameters that we know of, it is always better to have income than not to have income. I think that's a fairly universal finding including in terms of the type of medical care one can get. It's always better to have a private practitioner at one's call than to have to go to a neighborhood health clinic and wait around for hours and hours and so forth. The quality of the medical care one can obtain is I think a function of income in the United States.

Q. Does the knowing removal from a pregnant woman in the absence of disease of the opportunity for income

202 producing activity without substituting financial compensation expose not only the woman but their unborn children to unnecessary reproductive stresses? A. Yes, indeed it does.

Q. Would you list those stresses, the types of stresses that would— A. I would say the major one is the inability to—I'm not talking about Senator Kennedy's wife now. Wives of millionaires are well off. Whatever happens I would say it comes from the inability to buy the proper nutrition. Secondly, the inability to receive private and experienced care. That is to say that kind of care that comes with a physician having spent many years in practice rather than being attended to by a medical student or somebody of lesser experience. It can be extremely frustrating to have to be at home when one wants to work and it is psychologically not something physicians advise women to do, to stay home. Just simply because of the frustration and their ability to work.

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203 By Miss Weyand:

Q. As Director of the Kennedy Institute is your expertise limited to the medical field? A. Well, our institute does a lot of studies on the social consequences in terms of deficient outcome of pregnancy as it affects national economics and so on. That is not only our institute; that has been pointed out repeatedly in
204 front of the Senate by physicians, by sociologist and others. Morbidity, cerebral palsy, mental retardation, these things are enormously expensive to the country on a whole in terms of the upkeep of the deficient product of a deficient pregnancy.

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205 Q. You get into sex discrimination in your studies too?

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206 A. Well, I think there's considerable evidence that the presence of women in the work force has a fertility depressing effect. These are always studies that show a statistical association between women able to enter the work force and the number of children which they have. It was the basis of President Nixon's Commission on Population and America's Future's recommendation that child care facilities be made available to permit women to stay in the work force. There
207 are considerable data that women allowed to go further in the educational process are factually likely to marry later and therefore reach not only possibly a smaller family size, but make the gap between one generation of mother and the next generation of mother larger, which in itself has an effect in slowing population growth. So, yes, there are social consequences in the reproductive field that comes from social practice affecting women.

Q. You have made a study of those, have you? Been part of your institute work? A. Yes.

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210 Cross Examination By Mr. Searle

By Mr. Searle:

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217 Q. Now, you have indicated in your testimony that for a woman who has had a normal pregnancy and a normal delivery that they might return to employment or other normal functions within two weeks after delivery this might be possible? A. Yes.

Q. That you made the comment that they are returning, that is their body is returning to normal earlier than it used to? A. That's correct. That's to say women recover menstrual function and ovulation sooner nowadays than they did in the past and the higher the socio economic group, the sooner they will recover it.

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218 Q. You used the example of a technician in a radiological laboratory? A. Yes.

Q. Is the danger there to the mother or to the fetus? A. It would be to the fetus.

219 Q. Is there a difference between the two we can talk about the two medically separately? A. Yes. Let's put it this way: Any male or any female who works in a radiological department one would take precautions that they would protect their gonads from radiation. Now I suppose that one could say is the fact that your gonads are damaged by radiation whether it be male or female, does that mean you now have a disease?

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The difficulty now becomes do you believe that their possible production of abnormal children should be considered as a disease in them.

Q. And do you think it is? A. I wouldn't know how to define that. One could very well say it's only the child that is abnormal. My own view would be to say that the constant production of an abnormal child is an indi-
220 cation of a diseased state in the parent, be it a genetic disease, a disease of malnutrition, a disease of irradiation damage and that is precisely why I said earlier in the day that the production of children with excessive death and of children who are too small for their weight reflects the state of the mother and says that she, by having lost her income, is not up to snuff because I think part and parcel of the normal process of life is that if one is in a bodily state that is up to snuff one produces normal children.

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222 Q. You describe in your direct testimony that generally it is a three day stay in the hospital for normal delivery? A. By and large nowadays, yes.

Q. And I think you made reference to the fact that many women who left the hospital would then start to do housework and things of that nature around the home? A. Yes, depending on the cooperation of husband, mother-in-laws and other things.

Q. In some of the testimony of the individual complainants there was reference made to not climbing stairs and medically speaking is there a restriction placed on a female upon leaving the hospital and we're assuming a normal pregnancy and a normal delivery, medically is there any restriction on their capability or ability of being able to climb a flight of stairs? A. You mean something
223 like four days postpartum?

Q. Yes. A. Not really, no. It's frequently said in the same mythology as do not walk under ladders, do not let a black cat cross and things of that nature. It's not fundamentally a problem.

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APPENDIX D

Testimony of Dr. John C. Donovan, M.D.

(Called as a witness for the Respondents before the N.Y. State Division of Human Rights in *Franklin* v. *Stromberg Carlson Corp.*, Case No. CS-27069-72 and *Avery* v. *General Railway Signal Corp.*, Case No. CS-27503-72, in Rochester, N. Y., on April 18, 1973, cases presenting issues described at the beginning of Appendix C, p. 13a, *supra*.)

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92 DR. JOHN C. DONOVAN, a witness, was called to testify on behalf of the respondents and having first been duly sworn by the Hearing Examiner, testified as follows:

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93 Direct Examination by Mr. Ulterino

By Mr. Ulterino:

Q. Dr. Donavan, are you duly licensed to practice your profession in the State of New York? A. Yes, I am.

Q. Do you specialize, Doctor? A. Yes, obstetrics-gynecology.

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By Mr. Ulterino:

Q. To bring us up to date, according to your Curriculum Vitae you are connected with Strong Memorial Hospital. Would you tell us what your current appointment is at Strong Memorial Hospital? A. My current appointment at Strong Memorial Hospital is Obstetrician-Gynecologist. Currently I'm acting chairman of Obstetrics-Gynecology and chief obstetrician-gynecologist.

Q. Are you also on the faculty of the University of Rochester School of Medicine? A. Yes, I am.

96 Q. And what is your position there? A. Professor of Obstetrics-Gynecology and Acting Chairman of the Department of Obstetrics-Gynecology.

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Q. How many patients do you see a year? A. I will see perhaps fifty private obstetrical patients a year. These are patients whom I would see from the very early sign of pregnancy and personally provide care for them throughout pregnancy, labor, delivery and puerperium. Clinic patients we would see perhaps two thousand a year. These will be patients for whose care I would share responsibility together with other members of the faculty, but I may not personally render that care.

Q. How many clinical patients do you see a year, did you say?

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A. Approximately two thousand a year, obstetrics patients.

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102 Q. Doctor, in your opinion, is pregnancy a disease, illness or sickness? A. No, sir, certainly not.

Q. How would you classify pregnancy? A. Pregnancy per se is a normal physiologic event.

Q. You mentioned earlier, Doctor, that in defining sickness as sickness being connected with the reserve of an individual being able to cope with stimuli, in normal pregnancies or in most cases, would the reserves of a woman be sufficient to cope with this normal, what you call this normal physiological process of pregnancy?

103 A. Yes. Like any other physiological process pregnancy makes certain demands upon the physical reserves of the woman. In the case of the medically normal woman these normal reserves are more than able to cope with the requirements of the pregnancy.

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107 Q. Doctor, in describing pregnancy you have used the word normal pregnancy. What percent-

108 age of pregnancies, excluding inevitable spontaneous abortions could you reasonably estimate are normal pregnancies? A. Of course, in lecturing the

medical students we go over the statistics for this quite a bit. I can answer that pretty much off the top of my head. When you exclude inevitable spontaneous abortions in effect you're asking me what percentage of pregnancies that are destined to reach the point where the baby is theoretically living, if born could be expected to be normal. The figure there would be eighty to eighty five percent excluding spontaneous abortions, could be expected to be normal throughout.

Q. Just to be sure that the record is clear, when we used the term inevitable spontaneous abortion— A. We're talking about spontaneous evacuation, spontaneous I mean as the result of the force within the woman's own body, muscular contractions of the uterus, the evacuation of pregnancies in what are generally referred to as
109 miscarriages or, medically, abortions. When this occurs almost inevitably close to a hundred percent of instances it occurs prior to the twelfth week of pregnancy and is generally regarded as being due to some major abnormality within the pregnancy that existed almost from the moment of conception, genetic or perhaps due to an abnormal implantation of the fertilized egg abnormally in the woman's uterus. Indeed in many cases of spontaneous abortions the products that are passed will reveal there is no fetus present at all that has developed will be viewed as the afterbirth or placenta nine months later if it went that far.

Q. Doctor, in the case of a normal pregnancy may a woman continue her employment? A. Certainly. Let me hedge a moment on that. It would depend to some extent upon the type of employment. I have read about women now working for the telephone company as linemen. I don't think that a pregnancy, that a woman who is pregnant near term could climb telephone poles.
110 I interpret your question to mean could a woman continue normal day to day activities including work.

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Q. Doctor, we've referred to normal pregnancies and those pregnanciets being eighty to eighty five percent of all pregnancies. Now, what would you—how would you describe an abnormal pregnancy and what makes a pregnancy abnormal? A. I think abnormal pregnancies divide themselves into two broad groups. One group would be those pregnancies which per se may be normal, but have occurred in a woman with pre-existing or concurrent medical disease. In which the medical disease has already limited her reserves. Examples would be certain instances of patients with heart disease, kidney disease, cer-
111 tain instances of women who have diabetes. There the reserves have already been lowered by the disease process and in certain cases the added requirements of pregnancy to which I previously eluded may superimpose a load that would be beyond her lowered reserve and the pregnancy, viewing the total body unit of pregnancy in woman, would be viewed as abnormal. The other broad classification would be those instances in which the pregnancy develops some abnormality that is peculiar to and localized to the pregnant state.

Q. Would you elaborate on these abnormalities which are peculiar to the pregnant state? A. Yes. One of the more common that we encounter is so called toxemia of pregnancy which is the metabolic abormality characterized by elevation of the blood pressure, albumen in the urine and collection of fluid in the tissues. Another example would be placenta praevia in which the placenta has im-
112 planted very low in the uterus and may cause life threatening hemorrhage late in pregnancy. These would be examples of complications peculiar to the pregnant state.

Q. Going back, for a moment, to the woman who has a pre-existing condition or disease and who becomes pregnant. Now, in all cases would her pregnancy be classified as abnormal? A. Not at all. Well, pregnancy per se would not be abnormal. The pregnancy existing in this particular

woman, the total unit, the patient, looking at the total unit the situation might—would be abnormal. That does not mean to imply necessarily that all such cases would be disabled.

Q. Again, is it a question of her reserves? A. Question of reserves. To cite an example, some patients with diabetes, the diabetes may be very mild. The pregnancy may be normal. The woman is not disabled. Another patient may have severe diabetes although she may be able
113 to function in a day to day activity the severe diabetes would have severely lowered her reserves and then when pregnancy is superimposed she may become disabled. Whether the patient is disabled, clinically sick, if you will, more sick as a result of pregnancy is really function of reserves and that in turn is a reflection of the individual doctor.

Q. Doctor, would a patient whose pregnancy has some inherent abnormality necessarily be disabled? You may have already touched on that. A. No, very definitely not. Indeed some patients with medical illness are actually improved with pregnancy.

Q. What about the situation of bleeding during the course of pregnancy? A. Well, here bleeding is a symptom, if it's something the woman has noted herself. By definition I suppose it would be a sign of something the doctor observes. What was your question again?

Q. Would that necessarily be a severe complica-
114 tion of pregnancy? A. Not at all. In early pregnancy it would be—whether it would be a severe complication or disabling would reflect very largely on the amount of bleed. If the patient was bleeding enough so that her blood loss exceeded the capacity of her body to reproduce blood then she would sustain an acute anemia and most certainly be disabled. If she were just spotting in no way would she be disabled. The reason I draw that differentiation is because later in pregnancy we are getting into a symptom that may be due to much a whole different series of causes and spotting or mild degree of bleeding in

late pregnancy while the symptom would not be disabling, the potential disease or potential abormality would be potentially disabling to the patient until the doctor had excluded or included these various disease entities. Did I make that too complicated?

Q. That's fine. Maybe we can clarify it a bit more with this question: While fifteen percent, ap-
115 proximately fifteen percent of pregnancies are not normal, not all of those pregnancies that constitute that fifteen percent of abnormal pregnancies are necessarily disabling; is that correct? A. Not at all. That's correct.

Q. Again, this is a tie into her reserves and a function of her reserve to cope with the pregnancy? A. Yes.

Q. Does it have anything to do with the work that she was performing as to whether or not she was disabled? A. Yes. I think I indicated that earlier when I eluded semi facetiously to climbing a telephone pole. I think on the face, validity, a woman with a term abdomen would have to give up her activity if she were a professional athlete on a swim team. This does not have to do with normal day to day activities.

Q. But in terms of normal day to day activities and un-
der normal circumstances a woman could continue
116 to work? A. Yes. Every hospital is full of pregnant nurses and pregnant obstetricians who are working up to the actual onset of labor, doing their normal activities. If there's anything harmful about this such phenomenon would not exist.

Q. Anything beneficial in continuing to work? A. Yes, it is. The general medical feeling, if the patient is medically normal and the pregnancy is normal she should be indeed encouraged to continue her usual activities.

* * * * * * * * * * *

117 Q. Is a woman who has delivered a child disabled during the entire puerperium? A. Not at all.

Q. Of what period of time is a new mother clinically or medically disabled? A. In certain instances would not be

disabled strictly speaking a few hours after delivery of the baby. However, to respond to your question in a conservative way I would say a period of ten to twelve, maybe fourteen days they may be either disabled or at least at risk.

Q. At the end of this period of seven to ten days or as high as fourteen is a woman medically and clinically
118 able to return to work? A. Yes. I interpret your question to mean a normal woman with a normal pregnancy and normal delivery.

• • • • • • • • • • •

121 Q. Excuse me one minute, Doctor. One last question. This testimony that you have given today, is this just your own personal opinion or is this gen-
122 erally accepted medical opinion? A. I think I can say quite authoritatively that it is generally accepted medical opinion.

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Cross Examination by Miss Weyand

By Miss Weyand:

Q. Has there been a very radical change in the medical profession towards the length of time during which a woman may continue at her normal activities in the last thirty years? A. Very definitely.

Q. And it is a continuing shift; is that correct? Have the doctors all agreed with you that women now can continue their normal activities up until they go into delivery? A. I think there is a continuing shift, a further relaxation of the restrictions in the last five years. I think there are many—there are some physicians, I won't say many,
123 who would be more restrictive still and I would predict in the next few years the number of such physicians will further decrease. To answer your question I think the word "continuing" is correct.

Q. I'd like to read you a—I'm going to offer this ex-

hibit. I'll give it to you. Portion of testimony by Dr. William C. Keettels who is— A. Professor at Iowa.

Q. Head of the department, and I understand that he is one of the most prestigious of the obstetricians in this country; is that correct? A. I would agree.

Q. He was testifying in a case involving one of the issues here, the issue only of mandatory leave of a pregnant woman and what I wanted to direct your attention to was his testimony, the question, I'm starting on Page 18, the bottom part of the page (reading) "Is it still an acceptable standard also that a pregnant woman should leave her employment anywhere from four to six weeks prior to the time of delivery to become acclimated to the home
124 and acclimated to the time of delivery and such? Answer, I think no. I don't think that is necessary.

• • • • • • • • • • •

125 Well, I think the medical profession is really swung
126 around to the fact, the knowledge that a pregnant woman can work right up to term and not have any— accrue any disadvantage so that ten years I think that six months would have been common practice, but today it wouldn't be. Question, Would seven months? Answer, Well, it's the same. Question, Eight months? Answer, The same way."

Would you agree that the majority of practice now has swung around so they can work up to the delivery? A. That sounded very much like Dr. Keettels.

Q. You agree he's stating the medical practice as you understand it? A. As I understand what you have read, the answer is yes.

• • • • • • • • • • •

130 Q. If a female desires to work and you find that after seven days after delivery that she is not in your opinion medically disabled do you certify her as able to work? A. Yes.

• • • • • • • • • • •

131 Q. You have doctors and nurses that return within seven to ten days? A. Yes.

Q. And there's no medical indication that that is not completely healthy, I take it? You and the people around them know better than anybody else what's healthy? A. Seven to ten days perhaps the upper limit of normal and what we're talking about now, fourteen days.

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APPENDIX E

Curriculum Vitae

John C. Donovan, M.D.

Home Address: 54 Sunset Boulevard, Pittsford, New York

Office Address: 260 Crittenden Boulevard, Rochester, New York

Birth: November 15, 1919; Scranton, Pennsylvania

Social Security Number: 105-14-8501

Marital Status: Married, Margaret Wood, R.N.; 1947 Two children; daughter, born 1954; son, born 1958

Preliminary Education: Public School System, Binghamton, New York

College: University of Notre Dame, 1938-1941; B.S. awarded 1954

Medical School: University of Rochester School of Medicine and Dentistry, 1941-1943, 1944-1945; M.D. 1945

Board Certification: American Board of Obstetrics and Gynecology, 1954

Graduate Training

Student Fellow in General Pathology, University of Rochester School of Medicine and Dentistry, 1943.

Intern in Surgery, Yale New Haven Hospital, 1945-1946.

Assistant Resident in Obstetrics-Gynecology, Strong Memorial Hospital and Rochester Municipal Hospital, 1946-1947.

Resident in Obstetrics-Gynecology, Strong Memorial Hospital and Rochester Municipal Hospital, 1947-1948.

Fellow in Psychiatry, University of Rochester School of Medicine and Dentistry, 1948-1949.

Chief Resident in Obstetrics-Gynecology, Strong Memorial Hospital and Rochester Municipal Hospital, 1949-1950.

Post Graduate Appointments

Instructor (Full time) in Obstetrics-Gynecology and Assistant Obstetrician-Gynecologist, 1950-1954.

Assistant Professor (Full time) in Obstetrics-Gynecology and Associate Obstetrician-Gynecologist, 1954-1960.

Associate Professor (Full time) of Obstetrics-Gynecology and Senior Associate Obstetrician-Gynecologist, 1960-1966.

All of the Above at the University of Rochester School of Medicine and Dentistry and Strong Memorial and Rochester Municipal Hospitals.

Professor (Full time) of Obstetrics-Gynecology and Obstetrician-Gynecologist, University of Rochester School of Medicine and Dentistry and Strong Memorial Hospital, 1966-present.

Consultant in Obstetrics-Gynecology, The Genesee Hospital, Rochester, New York, 1960-present.

Professional Societies

Monroe County Medical Society

New York State Medical Society

American Medical Association

National Board of Medical Examiners

Associate Examiner, American Board of Obstetrics and Gynecology, 1961-present

American College of Obstetricians and Gynecologists

American Psychosomatic Society

Departmental Representative, Association of Professors of Gynecology and Obstetrics

American Association for the Advancement of Science

New York Academy of Sciences

Current Research Interests

Red cell and plasma volumes before and during early pregnancy; normative values.

Correlations of hypovolemia and hypervolemia with obstetric and medical complications.

Psychosomatic aspects of obstetrics and gynecology.

Studies in medical education.

Special Academic Responsibilities

1. Intradepartmental, Obstetrics-Gynecology
   Director, Maternal Continuity Clinic, 1960-present
   In charge, Out Patient Teaching, 1954-present
2. Interdepartmental, Medical School

   Member, Curriculum Committee, 1955-1962

   Chairman, Exploring Group for General Clerkship, 1962

   Member, Planning Committee for the General Clerkship, 1963-1965

   Member, Committee for Teaching of General Clerkship, 1966-present

   Member, Internship Advisory Committee, 1955-present

   Member, Committee for Interdepartmental Seminars, 1958-1964

Member, Medical School Admissions Committee, 1966-present

Chairman, Committee for the Study of the Educational Program, 1963-present

3. University of Rochester

Member, University Senate, 1966-1968

Member, Committee for the Improvement of Teaching, 1967-present

Publications

(22 publications listed)

APPENDIX F

Deposition of Dr. George Wilbanks

(Taken in Chicago on April 12, 1973, and received in evidence as an exhibit offered by Defendant GE in *Gilbert* v. *General Electric Company*, U.S.D.C.E.D. Va., Richmond Division, Civil Action No. 142-72-R, a class suit which presents the issue of whether GE discriminates because of sex in violation of Title VII of the Civil Rights Act, 42 USC 2000e, by refusing to provide income maintenance during absences due to pregnancy-related disabilities and childbirth when GE provides such income maintenance during absences due to other disabilities. See earlier reported decisions relating to procedural issues in same case, 347 F. Supp. 1058, 5 FEP Cases 74, 197 986, 989.)

1 DR. GEORGE WILBANKS being previously sworn, testified as follows:

Direct Examination

By Mr. Kammholz:

* * * * * * * * * *

Q. Are you currently practicing your profession in Illinois? A. Yes, I am.

Q. And what is that profession?

* * * * * * * * * *

8 Q. Should pregnant women be restricted from physical activities during pregnancy? A. If the pregnancy is not complicated, no. We do not recommend any real limitation of activities on our patients.

Q. Can pregnant women continue to hold gainful employment during pregnancy? A. Yes. As a matter of fact, two of our office nurses now are both pregnant.

Q. And when I ask you about holding gainful employment, for what period of pregnancy and how long prior to delivery? A. We don't make any restrictions on this. A woman may work as long as the pregnancy is progressing

normally, even up until time of delivery.

9 We recently had one of our nurses go into labor while on duty and she delivered at the end of the shift without complication.

Q. You would say this is indeed an efficient utilization of woman power in the hospital? A. Yes, a woman will do this at home. For example, in caring for children and taking care of her general household duties, she will not go to bed for the last six weeks or so.

Q. Would the lifting of weights or the climbing of stairs during pregnancy be harmful? A. I will merely say "no."

Q. Are there any particular kinds of jobs you would restrict pregnant women from performing during pregnancy? A. Probably one or two that you might restrict pregnant women on. There have been some data recently on nurse-anesthetists who work in operating rooms with various anesthetic gases and there seems to be some increase in abortion in women who work in these noxious fumes. Therefore, any type of occupation in which

10 the person was exposed to certain chemical fumes, that might have an effect on the fetus, I think should be limited.

I would imagine that in most jobs the safety factor would control this so that probably no one should be in that much of an atmosphere.

As a matter of fact, in relation to our anesthetics, we are now making certain that the gas is exhaled by the patients and conducted out of the operating room by an exhaust tube rather than just into the air as we have been doing it for many years.

* * * * * * * * * *

Q. Other than the example you just have referred to, are there jobs you would restrict pregnant women from performing? A. Offhand I would not think of any. The patients that I have had in pregnancy have been pro-

12 ceeding normally and we have not suggested change in jobs. I cannot recall one.

Q. What about the physical activity, such as golfing, bowling, horseback riding? A. Well, our usual recommendation to the patient is that they continue their usual activities at a reasonable rate. If a woman plays golf or tennis, does horseback riding, then it is suggested they may continue whatever they are used to. About the only thing we suggest is "don't over exert" in connection with what they are normally used to.

Q. Does pregnancy affect coordination? A. I would say generally not. The only thing that might affect it would be in very late pregnancy, protuberant abdomen, very much as in a man or anyone who was twenty or thirty pounds overweight and had a protuberant abdomen. It would be, under those conditions, a little more difficult to get around.

As a matter of fact, one of my patients who played a lot of golf said that playing golf during pregnancy caused her game to improve because she had to hold
12 her left arm straight in order to get around the uterus.

Q. Doctor, does pregnancy affect judgment? A. I would say not. Women care for their families, purchase groceries and, insofar as I know, their judgment is still good.

Q. Does pregnancy affect I.Q.? A. No, not that I am aware of.

Q. Doctor, do you consider the period of labor and delivery as times of periods of sickness? A. Well, this is still part of the normal process of pregnancy. I guess the delivery and labor would be the ultimate of this sort of altered process but I would not really define it as illness, I think, unless there is something abnormal.

In the majority of labor and deliveries there are no difficulties. However, there are a small percentage that may be abnormal.

Q. Are the periods of labor and delivery accompanied by pain or at least extreme discomfort? A. Yes. I would say it is probably a majority that would be. I have
13 seen women who were well controlled, have done

lamaze exercises in connection with natural childbirth and really have had very little discomfort during labor.

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Q. Let me restate it. I think you may have answered it. Are the conditions of labor and subsequent delivery conditions of disease? A. No. As I have defined it, pregnancy, which would include labor and delivery, is a normal process. I don't think anyone would want to walk back from the labor room, although this has been done and although I would not class it as a disease.

• • • • • • • • • • •

15 Q. What about the period after childbirth—is it a period of sickness? A. It is a period of return of the altered state of physiology back to the more usual states but, again, I think there is a normal process of involution of the uterus, return of the uterus to normal size and other body functions that also return to the pre-pregnancy state.

• • • • • • • • • • •

Q. In terms of physiology, how long is the period for the return to the normal state? A. Characteristically it has been defined as six weeks. Now, Dr. Williams at Johns Hopkins, one of the grandfathers of American obstetrics, did some studiets indicating that the uterus returnd to its normal state, at least the placental area, after birth
16 or no later than six weeks and so most people have used this as their norm, I would say, for return to normal.

Q. To put it another way, is it fair to say then that the return to normal physiology occurs over a roughly six-week time span and that is a six-week return as contrasted to nine months during which the altered physiology developed? A. Right.

Q. Prior to delivery? A. Yes, I think that would be correct. Certain things return to normal much faster than others. Certainly, for example, the hormone levels return

to normal within forty-eight hours after delivery. It is more of a progressive thing over, roughly, a six-week period.

Q. During this six-week period, normally, is a woman disabled? A. Certainly in the early part of this I think she would be somewhat disabled. We send patients home now in three days, suggesting they take it a little easy for a couple of weeks, but most of the women are back taking care of their families fairly shortly after this. Most
17 of the families now do not live in the same town with Mama or Grandmother and so they are back pretty much taking care of their house and the new baby as soon as they go home.

For example, I understand, in relation to a young woman who was finishing her residency at one of the neighboring hospitals, she was out for a total of two weeks from her internship with her first pregnancy, I guess it was. She was back working in two weeks. Therefore, this becomes quite a variable thing, I think.

Q. Did the two weeks cover the pre-delivery, delivery and post-delivery period? A. Yes. We do not usually recommend this but it is being done.

Q. You referred earlier, Doctor, to abnormal pregnancy. Would you tell us, please, about the kind of abnormalities that occur in connection with pregnancy and delivery? A. Probably I can group abnormalities, as we do for teaching medical students, into three trimesters of pregnancy,
18 the first three months, the middle three months and the last three months.

Abnormal pregnancies in the first three months are usually related to some mal-development of the embryo, resulting in abortion called a spontaneous abortion. That would be by far the most common abnormality or complication in early pregnancy.

In the mid-trimester, again, this is a relatively innocuous time during pregnancy, if you will, and about the only thing that occurs during the middle trimester is a rather rare

condition called "the incompetent cervix—maybe this is too detailed—in which there may be an early delivery.

An immature delivery, in the last trimester, really one of the few, I guess we call it a disease state, something which complicates pregnancy is called a "toxemia pregnancy," which is a complex of high blood pressure, swelling and some kidney problems. Then abnormal pregnancies around the time of labor and delivery would be usually problems with bleeding due to some abnormalities associated with the placenta, the afterbirth.

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25 Cross-Examination

By Ms. Ruth Weyand

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56 Q. Now, Doctor, I am going to read you a question and an answer given by William C. Keettels, who is head of the Department of Obstetrics and Gynecology, University Hospitals, Iowa State University.

The question and answer I am going to read to you was given as a part of a deposition in Heinen v. Johnston Community School District before the Iowa Civil Rights
57 Commission, taken on October 9, 1972, by the Attorney General of the State of Iowa. The portion that I am going to read to you appears on page 21 of the deposition. Now, you have to go a little way back to get into the whole thing.

It reads as follows:

"It is kind of interesting about how people, how the medical profession changes. As you know, there was a time when women had to stay in bed for fourteen days after delivery and it took a long time before ambulation, and allowing them out of bed came about, and you can just see how the transition that occurred, that many doctors were so opposed to this, and all sorts of dire consequences would develop but it just took time before they accepted this.

Now everybody accepts ambulation within a few hours after delivery as perfectly acceptable."

Now, we come to the question—"Would we be in a same kind of transition period perhaps with the pregnant female working up until time of delivery?"

The answer—"I think yes. It has been a transition but I think we have made it now. The majority would accept that they could work up to term."

58 Now, Doctor, would you agree on that estimate of position taken by one of your medical profession? Would you agree with that statement? A. Yes. I would agree because, as I have stated earlier, insofar as our patients are concerned, they may work up until term.

Q. You agree the medical profession is in agreement today, the majority of them, following the same practice as far as you know? A. I can speak for those that I know.

Q. They do? A. Yes. I cannot, however, speak for the whole medical profession but I would agree with this. It is our practice in our own hospital.

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APPENDIX G

Curriculum Vitae

GEORGE DEWEY WILBANKS, JR.

Born: February 24, 1931 Gainesville, Georgia

Married: July 31, 1954—Evelyn Freeman Rivers—
B.A. Wellesley, 1954
M.A. Duke University, 1956

Children: George Rivers—Born: May 21, 1958
Wayne Freeman—Born: October 18, 1960

Education:

HIGH SCHOOL: Riverside Military Academy, Gainesville, Georgia
H.B. Plant High School, Tempa, Florida
Graduated June 19, 1949

COLLEGE: Duke University—A.B., June, 1953
University of Florida—Summer, 1951

MEDICAL SCHOOL: Duke University School of Medicine—M.D., June, 1956

INTERNSHIP: Pennsylvania Hospital, Rotating, June 1956-June 1957

RESIDENCY: OB-GYN, Duke Medical Center, July 1957-June 1961
Fellow-OB-GYN Pathology—Boston Lying-In Hospital and Free Hospital for Women, January-June 1959

Professional Experience:

Resident Instructor, Dept. OB-GYN, Duke Medical Center, July 1961-June 6.
Clinical Instructor, Dept. OB-GYN, Univ. Oklahoma School of Medicine, March 1963-June 1964

Associate, Dept. OB-GYN, Duke Medical Center, July 1964-June 1965
Special Fellow, National Cancer Institute, Dept. OB-GYN & Pathology, College of Physicians & Surgeons, Columbia-Presbyterian Medical Center, New York City, July 1964-July 1965
Assistant Professor, Dept. OB-GYN, Duke Medical Center, July 1965-December, 1969
Associate Professor, Dept. OB-GYN, Duke Medical Center, Jan.-June, 1970
Director, Gynecologic Oncology Division, July 1967-July 1970
Professor & Chairman, Dept. OB-GYN, Rush Medical College, Chicago, Illinois, July 1970—

Hospital Appointments:

Chairman, Department of Obstetrics & Gynecology, Rush Presbyterian-St. Luke's Medical Center, Chicago, Illinois, July, 1970—

Military Service:

Captain, USAF, Assistant Chief, OB-GYN Service, 2792 USAF Hospital Tinker Air Force Base, Oklahoma, July 1962-June 1964

Board Qualification:

American Board of Obstetrics & Gynecology, Diplomat 1965
Florida Board of Medical Examiners, 1956
North Carolina Board of Medical Examiners, 1956
Illinois Board of Medical Examiners, 1970

Society Memberships:

American College of Obstetricians & Gynecologists, Fellow
American College of Surgeons (Fellow)
Society of Pelvic Surgeons

Society of Gynecologic Oncologists
American Association of Cancer Research
American Society of Clinical Oncology, Inc.
American Society for Cytology
Tissue Culture Association
American Association for Advancement of Science
American Society of Colposcopy and Colpomicroscopy
Bayard Carter Society of Obstetricians & Gynecologists
Baker-Channing Society
Ex-Residents Association of Pennsylvania Hospital
International Society for Prevention of Cancer
American Medical Association

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Publications:

(35 publications listed)

APPENDIX H

Deposition of Dr. William C. Keetels, M.D.

(Taken by the complainant at Iowa City, Iowa, on October 9, 1972, in *Heinen* v. *Johnston Community School District*, Iowa Civil Rights Commission.)

* * * * * * * * * *

2 WILLIAM C. KEETELS, M.D., called as a witness by the complainant, being first duly sworn the Certified Shorthand Reporter, was examined and testified as follows:

Direct Examination

By Ms. Conlin:

Q. State your name. A. William C. Keettels.

Q. Your address, doctor? A. University, Department of Obstetrics and Gynecology, University Hospitals, Iowa City, Iowa.

Q. What is your occupation? A. Obstetrician and gynecologist, and head of the Department of Obstetrics and Gynecology.

Q. Doctor, are you licensed to practice medicine in the State of Iowa? A. Yes.

* * * * * * * * * *

Q. What was the preparation for your specialty? A. A complete residency training in obstetrics and gynecology, and then I have been taught at the University of Wisconsin, and then was in charge of obstetrics and gynecology at the Manhattan District project, and I have

3 been teaching in the Department since then. I am certified by the American Board of Obstetricians and Gynecologists, and I am a director and vice president of the American Board of Obstetrics and Gynecology.

Q. When were you certified, doctor? A. '42.

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Q. Have you done any writing in the area of obstetrics and gynecology? A. Yes. I am the author of 65 articles

dealing with various aspects of obstetrics and gynecology.

Q. Are you on the staff of any hospitals? A. Yes, here, staff of the University Hospital. This is a closed teaching staff hospital, so we don't have privileges
5 in other hospitals, nor do other doctors have privileges here, so I am on the staff of this hospital.

* * * * * * * * * * *

6 Q. Can you give us a percentage of employed women as opposed to—by "employed", doctor, I mean employed outside the home? A. In my practice, I would say that the majority of people are housewives, but in our practice that we deal with in the department we have what we called the clinical pay, which are student wives, and I would feel that 70 per cent—50 to 75 per cent of these are not only housewives but they are gainfully employed as teachers, or stenographers, or in other activities.

Q. How do you generally advise your patients and/or advise your students to advise their patients with respect to the condition of pregnancy and continued employment? A. Well, we tell them that pregnancy is a physiologic process and that the average pregnant woman has no problems during the course of pregnancy, so that she can carry on her household duties, and she can also carry on any gainful employment up to the time of delivery. Now, if there is an obstetric complication or medical problem, then the physician would decide that this shouldn't be carried out, that she shouldn't be employed, but there are
7 only probably about between 5 and 10 per cent of pregnant women that have complications, so that we teach our medical students that this is a physiologic process and that a woman is best active and doing just what she did before she became pregnant, and that includes sports too. In other words, if they like to ride horseback, or play tennis, or swim, why, we allow them to carry on any activity that they did prior to pregnancy in the pregnant state.

Q. I am going to ask you to assume the following facts for the purpose of a few questions, doctor, and they are as follows:

Assume a married female, age 24, in her first pregnancy, whose due date is October 23rd, 1972. She has gained approximately 25 pounds and is under a doctor's care, and her condition is satisfactory. She wants to continue to work. Her job is that of an art teacher. She teaches kindergarten through sixth grade. In her job she moves from room to room pushing a cart of art articles. She teaches 600 plus students divided into 25-student classes. Her class periods range from ½ to one hour each, that she generally remains standing throughout the class periods moving from desk to desk, or table to table, and bending over to check on the students' work. Her day begins around 8, and she leaves around 4 and spends 6 to 6½ hours in class, and she has held this same job for 2 years. Four of the classrooms are located at a former army facility known as Camp Dodge. She is required to drive there, 3 miles. Once every 6 school days she teaches in a barracks and is required to walk up and down one flight of stairs, going in and coming out of that building. Assume further that she is able to stoop, bend over and touch her toes, crouch, and perform all other normal movements without difficulty; that she is currently doing regular household chores such as shopping, cleaning, gardening, et cetera; that she testifies that she is not tired or fatigued, and suffers no difficulty or disability because of her condition. She is taking the following medication: Vitron C, mol-iron capsules and diuril. Based on those facts, doctor, do you have an opinion, based on a reasonable degree of medical and obstetrical certainty, as to this woman's ability to perform her duties as a school teacher? A. I think that she could perform these activities without any problem. I see no contrary indication to her being gainfully employed.

Q. Do you have an opinion as to this woman's or any reasonably healthy school teacher's general ability to function, whether or not it is impaired at the 5th or subsequent months of pregnancy? A. No, I think that they can work up to term, to delivery with no impairment, providing there is no medical complication.

9 Q. Is there any reason that a pregnant woman should discontinue her employment? A. Not in my opinion. Here at the University Hospitals we have changed. At one time women all had to stop work at the fifth month, but now they can work to term, and it is up to the woman and her physician to determine how they are getting along. Then, they can go back to work as soon as the physician and the patients decides that they can. They work in the operating room, and in many areas where they have to be on their feet for long periods of time. Now, the only problem—there is no problem, but if they feel that they can't carry on their duties as a nurse, why, then they wouldn't work, but this would be up to the patient and the physician, and it is very seldom this ever occurs, interferes with their working as a nurse and doing it well.

Q. Do you personally know, or have you treated any women, doctor, whose employment has had a detrimental effect, either on her health or on the health of her offspring? A. No.

Ms. Conlin: That is all.

Cross Examination

By Mr. Gaudineer:

Q. Doctor, may I ask you, then, as far as you are concerned, medically speaking, barring complications— A. Yes.

10 Q. —that any pregnant female is capable of working up until the onset of labor? A. Yes.

• • • • • • • • • • •

Q. My question is, barring this 5 to 10 per cent, or barring medical reasons only—I am talking about the typical pregnant woman. A. I don't see any reason why she shouldn't work up to term.

Q. If she desired to not work up to term? A. That is between her and her employer. It is not a medical—

Q. It is not a medical problem? A. Yes.

Q. You would so advise the employer that, medically speaking, or as far as you are concerned, she was capable of continuing her employment? A. That is correct.

Q. Is there an increase in the last two months of the pregnancy for the female to direct, what, more of
11 her attention toward that pregnancy with the change in her body, and what have you? A. Oh, I think as a woman approaches term she wonders when she is going to go in labor, and is the baby going to be normal, and things of this type, but I don't think it interferes with their functioning in a capacity, how they are employed, in other words.

Q. It wouldn't interfere medically, as far as she is concerned, with her employment? A. No. Mostly, I don't either.

Q. What emotional effect might this have as far as others in the employment, this would not be a medical problem? A. They are just like with all people. I mean there are certain people that—well, they have a cold. Why, they say they feel bad, and they tell everyone about it. Other people can have a cold and there is no problem about it other than the contagiousness of it, that they just go about their duties. So pregnant women vary too, in other words. Some pregnant women, I am sure that they want people to feel a little sorry for them, or something like this, but mostly, really, I can't see any difference.

* * * * * * * * * * *

14 Q. As a doctor, what would you certify to the employer concerning the capabilities of the patient af-

ter delivery? A. I would feel that in a month they are capable of going back and being employed.

Q. It would not be the 2 weeks? A. Well, they can in 2 weeks, but I think—

Q. Medically speaking are they capable in 2 wooks? A. Yes, in 2 weeks they are.

15 Q. So if they did not go back for a month that would be something between her and the employer? A. Yes.

Q. So really, as far as you are concerned— A. But after—I think that 2 weeks would be the bare minimum time because they are sore and have an episiotomy soreness, and are still bleeding, so I think probably the mean would be around 4 weeks.

Q. Do you have a maximum normal pregnancy, normal delivery? A. I would say that 6 weeks would be the maximum. Minimum, two except with the exception of nursing.

Q. This is something you really can't tell until after delivery? A. That is correct.

Q. Do I understand you, then, that from your point of view that the actual time a woman would be incapable of performing her services, from a medical standpoint, only because of pregnancy and delivery, would be a mean of 4 weeks, and a maximum of 6 weeks? A. After delivery.

Q. What about—I thought she is working up until the onset of labor? A. Yes, worked up to the onset of labor.

Q. And hopefully she is in labor for what, 8 hours?

16 A. 8 to 12 hours.

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Q. Okay. So, outside of the day of delivery, then, we are just talking about a mean of 4 weeks, or maximum of 6 weeks afterwards? A. Yes.

Q. That should be all the time that they should lose from their employment? A. Yes.

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18 Q. Is it still an acceptable standard also that a pregnant female should leave her employment any-

where from 4 to 6 weeks prior to delivery to become acclimated to the home, and acclimated to the time of delivery, and such? A. I think—no, I don't think that is necessary.

Q. Well, necessary or unnecessary, is it an acceptable standard? A. Why—

Q. If a doctor would practice that, would that be
19 an acceptable medical standard? A. It would be acceptable if he practiced that way. It would be acceptable if he didn't.

Q. Well, that is my question. Yes or no, one way or the other, it is still an acceptable medical standard? A. Either way, it is acceptable.

Q. Would it be an acceptable medical standard for a doctor, in consultation with the pregnant patient, to decide with her that perhaps she should not continue her employment past 3 months of pregnancy, and thereafter certify to her employer that she should be allowed a leave of absence because of that pregnancy? A. No, I have never heard of that.

Q. Do you know whether that would be acceptable if a doctor did practice it, or acceptable if he did not practice it? A. I would say that if he did practice it, most of his colleagues would think he was awful conservative in his attitude, and they wouldn't agree to it.

Q. Would they disturb it? A. No, because people, in their private practice of medicine, do a lot of things that some of us might not approve of. As long as it isn't illegal, or a poor practice, why, they wouldn't do anything about it.

Q. Would that be a poor practice? A. In my opin-
20 ion, it would be, but it is such a—it isn't enough of a misdemeanor that you could do anything about it. That is the point I am making.

Q. In the professional realm, it would not be sufficient? A. No, it wouldn't.

Q. What about 6 months? A. Again, I think that that is an undue period of time.

Q. Would that be likely to be more acceptable to a larger majority of the practice than the 3 month position? A. Well, I think the medical profession has really swung around now to the fact—the knowledge that a pregnant woman can work right up to term and not have any—accrue any disadvantage, so that 10 years ago I think that 6 months would have been a common practice, but today it wouldn't.

Q. Would 7 months? A. Well, it is the same way.

Q. 8 months? A. The same way.

Q. Are you acquainted with other doctors who have been practicing for 10 or more years? A. Yes.

Q. Are you acquainted with whether or not they generally advise that they work directly up to term time, or whether or not some of them advise that they take a
21 leave of absence some weeks prior to the projected term? A. Oh, I am sure there would be some older physicians that would probably advise that they take a leave of absence.

Q. Some weeks prior to term? A. Yes. It is kind of interesting about how people—how the medical profession changes. As you know, there was a time when women had to stay in bed 14 days after delivery, and it took a long time before ambulation, and allowing them out of bed the first day came about, and you can just see the transition that occurred, that many doctors were so opposed to this, and all sorts of dire consequences would develop, but it just took time before they accepted this, and now everyone accepts ambulation within a few hours after delivery as perfectly acceptable.

Q. Would we be in that same kind of a transition period perhaps with a pregnant female working up until term? A. I think, yes, it has been a transition, but I think we have made it now. The majority would accept that they could work up to term.

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